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AN EDITORIAL

THE ADOPTION in August 1954 of a proposed Uniform Arbitration Act by the Commissioners on Uniform State Laws is an event the significance of which it would be difficult to overestimate. Containing provisions which render enforceable agreements between parties for arbitration of future disputes, the draft law would remove an obstacle which has retarded the progress of arbitration for more than three hundred years.

Early in the 17th century, Lord Coke ruled, in the *Vynior* case, that contracts providing for arbitration of future disputes were invasions of the jurisdiction of courts and that as such they were not to be enforced, except by suits for breach of contract. This decision has weighed heavily on the subsequent history of arbitration; if arbitration, once agreed to, could not be expeditiously compelled under the contract, then much of the advantage of arbitration was lost.

This unsatisfactory state of affairs was inherited by the American colonies. It was not until the early 1920's that the needs of American businessmen for inexpensive and practical means of resolving day-to-day commercial controversies were recognized in reform legislation. In 1920, through efforts of the New York State Bar Association and the New York State Chamber of Commerce, New York led the way with the first modern arbitration statute in the United States, providing for enforcement of agreements to arbitrate future disputes. Five years later, the Federal Arbitration Act was adopted. Since 1920, a total of fifteen states have passed laws giving legal sanction to the future dispute clause.

It was shortly after the enactment of the New York law that the Commissioners on Uniform State Laws, for the first time, adopted a draft which provided for enforcement of agreements to arbitrate future disputes. Unfortunately, however, progress does not always proceed in an uninterrupted straight line; the following year, the Commissioners reverted to the Lord Coke doctrine.

But the arbitration movement did go forward. Several years ago, partly in response to the growing interest in arbitration among businessmen, labor and management groups, and lawyers, and partly as a result of the educational work of the American Arbitration Association, a new attitude became evident. A special committee of the Commissioners on Uniform State Laws was established, under the chairmanship of Maynard E. Pirsig, Dean of the Law School of the

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AMONG OUR CONTRIBUTORS

MAYNARD E. PIRSIG is Dean of the Law School of the University of Minnesota and Chairman of a special committee of the National Conference of Commissioners on Uniform State Laws which was created a year ago to prepare a draft of a uniform arbitration statute. This draft was presented and discussed at a meeting of the Conference in Chicago during August 1954. Dean Pirsig is also a member of the U. S. Supreme Court Advisory Committee on Rules of Civil Procedure.

Several years ago, the late R. Emerson Swart, then President of the American Arbitration Association, established a fund to encourage the study of arbitration. A prize of $500 was announced for the best essay, to be completed under the direction of New York University School of Law. The result was the article by JEROME L. ABRAMS which is the feature of this issue of The Arbitration Journal. Mr. Abrams is a member of the New York law firm of Lehman, Goldmark and Rohrlich.

OWEN FAIRWEATHER is a member of the Chicago law firm of Seyfarth, Shaw and Fairweather, and is frequently called upon to address gatherings on technical problems of industrial relations. The excerpts from his address before a recent meeting of the Industrial Management Society reprinted in this issue will be of special interest to labor and management representatives who often face common problems in presenting wage incentive and workload disputes before impartial arbitrators.

It has often been noted by scholars that civilized man, throughout all recorded history, has expressed his instinct for justice through application of principles of arbitration, in one form or another. GEORGE S. ODIORNE, a specialist on the extension staff of Rutgers University, makes an interesting contribution to the history of arbitration with his account of the peacemaking practices among early Quaker communities in America.

TOWARD A UNIFORM ARBITRATION ACT

Maynard E. Persig

At the Conference of Commissioners on Uniform Laws, held during the week of August 9, 1954, the first draft of a uniform arbitration act was considered. The draft was prepared by a committee consisting of Hon. Otis S. Allen of Kansas, Mr. Marvin J. Bertoch of Utah, Mr. Tom M. Davis of Texas, Mr. Alfred M. Pence of Wyoming and the writer as chairman. The draft had also the approval of the section headed by Mr. Joe Estes of Texas, which created the committee. In the course of its preparation, valuable suggestions and assistance were received from the American Arbitration Association, Miss Soia Mentschikoff, under whose direction extensive and important research work on arbitration is being done at the University of Chicago Law School, and Professor Wesley A. Sturges, of Yale University Law School, whose exceptional qualifications in this area are well known. Of very great aid also was the model act prepared by a committee of the American Arbitration Association which appeared in *Arbitration Journal,* Volume 7, page 201.

This is not the first time the subject has come before the Commissioners. In the early twenties, a Uniform Arbitration Act was approved but was later withdrawn. Its approval followed lengthy discussion over whether it should extend to disputes arising subsequent to the arbitration agreement. Those who opposed this extension prevailed and the act applied only to agreements to arbitrate existing disputes.

The draft submitted to the recent Conference of Commissioners on Uniform Laws was a tentative one. Under the rules of the Conference, designed to promote thorough consideration and careful draftsmanship, it must be again considered at two successive meetings. However, in view of the generally favorable reception it received, a summary of some of its principal features is warranted.

The basic principles and policies underlying the draft correspond

substantially to those of the New York Act and to the acts of other states patterned in varying degrees on the New York model. Its highlights can conveniently be presented under three headings: (1) the agreements to arbitrate to which the act would apply; (2) the judicial procedure by which agreements to arbitrate and arbitration awards can be enforced; and (3) the provisions regulating the hearing by the arbitrators.

(1) *Agreements covered.* The draft act validates any written agreement to submit either an existing controversy or any controversy arising between the parties subsequent to the agreement. Unlike most statutes dealing with the point; e.g., 2 N.J. Stat. Ann., Art. 2, sec. 40-10, the proposed act does not limit the future disputes to which it applies to those which might arise out of the agreement containing the arbitration clause. In this respect it corresponds to the New York act. See N.Y. Civil Pr. Act, sec. 1448.

The draft also provides that it shall apply to labor arbitration contracts unless the contract specifies otherwise. While labor arbitrations deal with questions quite different from commercial and other arbitrations, the problems arising out of the arbitral process itself and the statutory provisions needed to meet these problems are not sufficiently different to warrant a separate act. A general arbitration statute drawn with the recognition that it is to serve the needs of labor arbitrations as well would seem to be the wisest legislative approach. Moreover, under the draft act the parties to a labor arbitration agreement can designate in their contract that the act as a whole or any part of it shall not apply.

(2) *Enforcement procedure.* For the purpose of compelling arbitration the draft act follows the summary motion procedure appearing in the New York act, see N.Y. Civil Pr. Act, sec. 1450, but with substantial simplification and changes. An application by motion is made to the court[1] for an order directing arbitration. The order must be granted if the court finds that there is an agreement to arbitrate covering the dispute in question and that the opposing party refuses

1. The draft provides: "The term 'court' means any court of competent jurisdiction of this State. The making of an agreement described in Section 1 providing for arbitration in this State confers jurisdiction on the court to enforce the agreement under this Act and to enter judgment on an award thereunder.
"An initial application shall be made to the court of the county in which the agreement provides the arbitration hearing shall be held, or in the absence thereof, of the county where the adverse party resides or, if he has no residence in this State, to the court of any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs."

to arbitrate. If there is an action involving the dispute pending in a court with jurisdiction to hear such motions, the motion must be made in that action and the order directing arbitration will also stay the action. In case the court does not have jurisdiction, the stay is granted only upon a showing that the motion or an order to arbitrate has been made in another proper court.

The draft does not include a provision such as N.Y. Civil Pr. Act, sec. 1458 under which a party may serve his opponent with notice of intention to arbitrate. If the opponent does not make a motion within ten days thereafter to stay the arbitration, he cannot thereafter raise the objection that no contract to arbitrate was made. With the summary motion available to compel arbitration the need for this additional measure has not thus far been apparent. The state of Washington appears to be the only other jurisdiction which has such a provision.

The other major area of judicial intervention concerns the enforcement of the award. The draft act adheres to the traditional motions to confirm, vacate or correct or modify the award. However, these motions have been integrated, for they are necessarily interrelated. On an application to confirm the award being made under the proposed act, any grounds for vacating or correcting or modifying the award must be asserted by the opposing party. Similarly, if a motion to vacate or to correct or modify an award is made but is not granted, the order denying the motion will without further application also confirm the award.

Some moderate changes in the grounds for vacating the award generally recognized by statutes are introduced by the draft. Probably the most debatable is the addition of the ground that the award is "unconscionable." The intent was to afford some judicial relief in those exceptional cases where an outrageous award has been made. It was not the intent to permit awards to be set aside merely because the court disagreed with the arbitrator's decision on the merits. Whether the language used or any other that can be devised would, in practical operation, preserve this distinction in courts hostile to arbitration may be open to question.

A provision has been included permitting confirmation of awards and entry of judgment upon them even though such a judgment would not have been obtainable in a legal action. The necessity for such a provision is pointed up in cases of stock in a corporation being evenly held by stockholders who cannot agree on a question of corporate policy. It is an increasingly frequent practice to submit

such disputes to arbitration and thus avoid dissolution. See O'Neal, Resolving Disputes in Closely Held Corporations: Intra-Institutional Arbitration (1954) 67 Harv. L. Rev. 786. Awards in such cases should be enforceable even though a similar judgment could not be obtained in an action.

(3) *Arbitration hearings.* In the provisions dealing with arbitration hearings, the aim was to safeguard the essentials of a fair hearing without detracting from the informality, the freedom from technicality and the dispatch which characterize arbitration hearings and which are commonly important reasons why the parties have agreed to resort to arbitration. The right to be heard, to present evidence and to cross-examine witnesses is stated. The draft also contains the usual provisions for notice of the hearing, for the taking of depositions and issuance of subpoenas, for adjournment by the arbitrators, for hearing and determination notwithstanding the failure of a party notified to appear, for majority determination by the arbitrators, etc. These provisions are subject, however, to the terms of the agreement.

In line with prevailing statutes, there is no provision that the usual rules of evidence shall apply or that the evidence taken must be recorded. On the other hand, there is nothing in the draft which would prevent the parties in their contract or otherwise from stipulating to the contrary.

The draft asserts the right to appear by counsel in any proceeding or hearing and any waiver prior thereto is ineffective.

A good deal of thought was given to provisional remedies. The present language of the draft act reads: "At any time prior to judgment on the award, the court on application of a party may grant any remedy available for the preservation of property or securing the satisfaction of the judgment to the same extent and under the same conditions as if the dispute were in litigation rather than arbitration." The need for some such protection against a party seeking to defeat enforcement of the prospective award by secreting or disposing of his property seems evident. An earlier draft, patterned on a section of the original Uniform Arbitration Act, was properly criticized as too broad and possibly permitting courts even to issue labor injunctions contrary to existing statutes. The present draft should meet these objections.

Another significant provision limits the time within which an award must be made. If not fixed by the agreement, the time limit is 60 days after the close of the hearings or such additional time as the court may order. This might be extended by the parties in writing.

However, the objection that the award was not made within the time limit is waived unless the objecting party notifies the arbitrators of his objection prior to the delivery of the award.

On the whole the draft was well received at the meeting of the Conference of Commissioners on Uniform Laws. Limiting the act to agreements to arbitrate existing disputes was not urged. Considerable discussion centered on the need for a procedure whereby a party contending that he did not agree to arbitrate the dispute in question could obtain a prompt judicial determination of his contention and a stay of the arbitration proceeding. The need was pointed out for more specific provisions dealing with tripartite arbitration boards in which two of the members act as representatives of the parties appointing them and not as neutral arbitrators. Inquiry was made whether the arbitrators should not be empowered, within appropriate restrictions, to interpret or modify their awards. A motion to incorporate a provision permitting courts to vacate awards for errors of law did not prevail. A number of suggestions relating to wording and style were made.

On the whole, however, no serious criticism developed on the substance of the provisions outlined above. At the present writing, the prospects are favorable that in due course a sound uniform arbitration act will emerge which will reflect the product of many minds and the experience of many persons. In the meantime, suggestions and comments from those interested in this important subject will always be welcome.

ARBITRATION, COURTS AND CORPORATE PROBLEMS: A Semantic Approach

AN R. EMERSON SWART PRIZE-WINNING ESSAY

Jerome L. Abrams

> *"The same words may have different meanings. . . ."*
> OLIVER WENDELL HOLMES, *Lamar* v. *United States*, 240 U.S. 60, 65.
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> *"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content, according to the circumstances and the time in which it is used."*
> OLIVER WENDELL HOLMES, *Towne* v. *Eisner*, 245 U.S. 418, 425.

Introduction

It is almost commonplace to read both in opinions of the courts and in articles that arbitration is a "judicial" or "quasi-judicial" process. The language of the court in *Matter of Brody* is typical: "Arbitration is a judicial proceeding and arbitrators perform a judicial function."[1] In a law review article, Philip G. Phillips generalizes: "There can be no doubt but that modern arbitration statutes adopt the judicial view of arbitration."[2]

Accepted uncritically, such statements seem accurate and innocent enough. On analysis, however, such statements are revealed to be susceptible of different meanings and thereby may prove misleading. The way we describe the process may affect the "thinking" of those who play a part in that process. As we shall see, statements of this sort may serve to lead courts and attorneys to apply the familiar norms and standards of the courtroom to a proceeding which is basically dissimilar to a legal action and designed to further a different end.

1. 259 App. Div. 720, 721 (1940).
2. *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 Harv. L. Rev. 590, 594 (1934).

The parties to the arbitration may oftentimes find themselves in the presence of attorneys who utilize in the arbitration proceeding all the subtleties and technicalities so persuasive in the courtroom.[3] The practical businessman may also be confused by the relationship of arbitration to the courts. He might quite properly ask himself how it is possible for arbitrators who may be laymen to cope with "judicial" criteria; and he might then question whether it is worth while proceeding to arbitration if the courts will ultimately insist on the application of legal criteria. Another result of such confusion is the creation of animosity between the businessman and the bar. The attorney may not infrequently find himself regarded as an obstructionist and unwelcome intruder at the arbitration proceeding.

This monograph attempts to examine the nature of the arbitration process and its relation to the courts, to illustrate the type of thinking which has sometimes been indulged in by the courts, and to consider the role of arbitration in respect to close corporations. The language applied in discussions of these problems may perhaps be more important than is ordinarily thought.

The study may, incidentally, serve to clarify certain aspects of the problems of arbitration heretofore somewhat obscure. For instance, if arbitration is a "judicial" process, it seems quite odd that its application to fields involving a strong element of public policy has been suspect. After all, the courts deal with problems of public policy daily. If, on the other hand, arbitration is not actually a "judicial" process, it is more understandable why the mechanism of arbitration should not be made available to certain questions with a high degree of public policy content. The problem becomes particularly acute in cases involving corporations.

An understanding of the use of language may have an important bearing on the treatment by the courts of certain issues before the arbitrators and, indeed in the case of corporate problems, on the question of whether or not a dispute will in fact ever actually come before the arbitrators for disposition.

Semanticists have distinguished two different functions of language—that is, a distinction between the "symbolic" or "scientific"

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3. See Grossman, Moses H., *Arbitration and the Lawyer,* XVII New York University L. Q. Rev. 511, 516 (1940), where he states: "Arbitration, then, is not a panacea. It is a potent instrument, but not the only instrument, for the achievement of justice. As yet, however, the average lawyer has not understood its use and value. When he comes to know arbitration intimately, he will use it more often and more wisely."

function and the "emotive" use of language. As Ogden and Richards put it:[4]

> "The symbolic use of words is statement; the recording of the support, the organization and the communication of references. The emotive use of words is a more simple matter, it is the use of words to express or excite feelings and attitudes."

An even later refinement of the basic distinction between what shall hereafter be called the "emotive" as distinguished from the "scientific" function of language is the more modern view that the two functions are not always alternative, but are sometimes conjunctive, with either of the two predominating.[5] If an utterance fails to show its objective reference it may be purely emotive in effect; if it fails to communicate an attitude of mind but instead refers to basic characteristics it may perhaps be said to be scientific. Although the distinction between the two functions of language is not always apparent and clear-cut, it is important to differentiate clearly between them.[6]

The two functions of language have not always been differentiated in discussions as to the nature of the arbitration process. On the one hand arbitration has been called a "judicial" process in the emotive sense by writers and judges who are thereby expressing their basic admiration for a proceeding which they hope to raise to the dignity of a court proceeding and who seek to evoke those same feelings in others.

Thus Joseph Wheless is utilizing the emotive definition in his article *"Arbitration As A Judicial Process of Law"* where he remarks:[7]

> "The purpose here in mind is to challenge public attention to the admirable process of arbitration as the most expeditious method for settlement of legal controversies and especially to signalize the manifold advantages of the new status given to arbitration by the recent Arbitration laws. . . ."

In discussing the cardinal changes brought about by the Arbitration Law of 1920, Wheless continues to invoke the emotive function

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4. Ogden, C. K. and Richards, I. A., *Meaning of Meaning*, p. 149 (London, 1930). See also Carnap, R., *Philosophy and Logical Syntax*, p. 27 (London, 1935).
5. Mace, C. A., *Representation and Expression*, Analysis Vol. I, pp. 33-34, See also Reid, R. J., *A Theory of Value*, p. 194 (New York, 1938).
6. In Mind, Vol. XLVII, p. 200, April, 1938, H. Wodehouse states: "The fact that it is difficult to determine precisely where the one function ceases to be useful and the other becomes predominant does not render the distinction itself unimportant."
7. Wheless, J., *Arbitration As A Judicial Process of Law*, 30 W. Va. L. Q. 209, 211 (1924).

of language in relation to the arbitration process, by talking about "the notable accomplishment of bringing about the enactment of this epoch-making legislation which raised arbitration to the status and dignity of judicial process of law."[8]

The scientific definition of arbitration is altogether different. Such a definition attempts to ascribe characteristics to the term rather than to emphasize its emotive appeal. Perhaps the best example of the scientific use of the phrase "judicial process" was furnished by Supreme Court Justice Felix Frankfurter:[9]

> "The judicial process demands that a judge move within the framework of relevant legal rules and the convenanted modes of thought for ascertaining them."

In passing on the awards of arbitrators, the courts may themselves be influenced, however subtly, by applying the word "judicial" to the arbitration process, emotively, and then by considering the issues on the basis of the scientific meaning of that term.

Arbitration and the Courts

The concept of commercial arbitration has undergone a profound change since the early days when the English courts viewed the process as a contest in which arbitrators vied with the courts for jurisdiction over disputes.[10] Today, arbitration has clearly and firmly woven itself into the business fabric of our society.[11] Oddly enough, however, it has perhaps still not received the kind of critical analysis which one would expect for a process which has assumed such important proportions through the years.

For the most part, many of us have been content to assume that the arbitration process is a "judicial" process. Some commentators on the contemporary scene argue that the arbitration process should be integrated more closely into an overall "judicial" pattern.[12] The business man, however, has traditionally thought of the arbitration process as a practical proceeding wherein he can quickly arrive at a determination of a dispute without any legal complications. Allow-

8. Wheless, J., *supra*, 216.
9. From Judge Felix Frankfurter's opinion for non-participation in the case of *Public Utilities Commission of the District of Columbia v. Franklin S. Pollack and Guy Martin*, 343 U.S. 451, 466 (1952).
10. See Sayre, Paul L., *Development of Commercial Arbitration Law*, 37 Yale L. J. 595, 610 (1927-28).
11. Domke, Martin, *Arbitration*, 28 N.Y.U.L. Rev. 835 (1953): "The increased number of court decisions on arbitration indicates the expanded use of arbitration for the settlement of labor management, civil and commercial disputes."
12. See Phillips, Philip G., *Rules of Law or Laissez-Faire in Commercial*

ing the basic nature of the arbitration to remain inarticulate has several inherent defects. It has sometimes served to thwart the business man's expectations and to disrupt the harmonious relationship between the courts, laymen and attorneys by actually meaning something different to each person.

Before evaluating the process it would seem necessary to give some consideration to the function which arbitration is designed to perform and the actual process by which the arbitrators reach their decisions. Only after this is known can we be in sound position to treat the applicability of arbitration to a particular subject. The extent to which arbitration is proper and adaptable to disputes in the field of corporations, domestic relations, patents, trade-mark and copyrights is, after all, a question of considerable importance and, it may be stated, one that is not entirely clear at the present time.

What, then, is arbitration designed to do? The function of arbitration has been succinctly stated as follows:[13]

> "In the law the rendering of exact justice in the matter presented is a final aim. But in business the settlement of a given dispute is not the most important thing. The big thing is the relationship between the parties. In its formal tribunals the law must ignore this preservation of relations between the parties, however momentous."

There are significant differences, too, between the actual processes of the courts and the arbitrators in reaching their decisions. The nature of the judicial process has been, perhaps, best summarized by Mr. Justice Cardozo when he stated:[14]

> "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. *One of the most fundamental social interests is that law shall be uniform and impartial. . . .*

Arbitration, 47 Harv. L. Rev. 590, 627 (1934): "Let us make business tribunals a part of a well balanced judicial system and assure that they follow our legal heritage."

13. Cohen, Julius Henry, *Arbitration and Public Policy,* 5 Arbitration Journal, 209, 219, (1941, quoting Herbert Harley, Secretary of the American Judicature Society).
14. Cardozo, Benjamin, *The Nature of the Judicial Process,* p. 112 (New Haven, 1921, emphasis the author's).

Therefore in the main there shall be adherence to precedent."

This is not to say that precedent is always the motivating force in the court's decision. As we all know, strong judges have from time to time broken away from precedent and made new "law" when the social scene would appear to dictate a change. But even in such instances the judge's action is influenced by the "collective" judgment of his predecessors. In Cardozo's words, the court's actions are established "by the examples of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law."[15]

The process by which the arbitrator reaches his decision in most cases is not the same. The emphasis is quite different. The arbitrator brings into play and stresses the ethical notions and trade practices prevalent in the industry. It has been said that "more than in any other field commercial law is based upon universally established custom."[16]

In many instances where a legal principle may be said to compete with such business notions, the legal principle, even if understood, may be disregarded. Consequently, the results in arbitration are sometimes different from those the courts might have reached on the same set of facts. Arbitrators, for instance, will probably pay scant attention to such technical questions as when legal title passed in their efforts to determine liability. As stated in a note in the Harvard Law Review:[17]

> "Courts, applying the Sales Act, would permit the buyer to reject a defective delivery, but an arbitrator is likely to require the buyer to accept and pay for such goods, allowing an appropriate deduction for any deviation in quantity or quality."

The arbitrator will usually strive to give that type of relief which will work the least hardship on both parties, whereas a court may oftentimes "think" in terms of a complete enforcement of a claim or of its total rejection. In other words, the arbitrators would appear to take a more flexible approach to a specific dispute. It has been stated that "arbitrators are often motivated by a desire to salvage something from the contract and, to do justice to both sides, will award compromise damages."[18]

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15. Cardozo, Benjamin, *supra*, p. 114.
16. Graham, Andrew J., *The Function of the Arbitrator in Intra-Governmental, Commercial and Labor Disputes,* 5 Arbitration Journal (N.S.) 250, 251 (1950).
17. 61 Harv. L. Rev., 1022, 1025 (1948).
18. 61 Harv. L. Rev., *supra,* p. 1026.

The arbitrator is much more likely than a court to order specific performance of a sales contract where he believes that a buyer has unjustifiably cancelled an order prior to delivery. The court in the same matter would probably be more disposed to make an award of damages, since the goods had not been appropriated to the contract and title had not yet passed to him.[19] The arbitrator will consider the legal issues, if at all, in the light of the prevalent trade customs.

It is, then, inaccurate to think of the arbitrator—who, in many cases is not even a lawyer—as a judge. Yet such a notion is implicit in the statement that arbitration is a judicial process. The arbitrator is rather a designee of the parties who, as such designee, sits in judgment as the personal choice of the parties. M. Herbert Syme has summarized the effect of the confused thinking on the subject in the following way:[20]

> "There has been a great deal of foggy thinking on the score. The arbitrator has been compared to a judge. He has been characterized as the protector of the public. His functions have been described as those of a court of industrial relations. The corollary of the notion that the arbitrator is a judge is the judicial approach to arbitration. The sequitur of the concept that the arbitrator is a public representative leads one to the conclusion that some nebulous interest known as the public interest must be served at all costs. If the arbitrator is the court of industrial relations, then by all means we must abide by all of the paraphernalia of the courts. We must have precedents and *res adjudicata* and *stare decisis*."

On the other hand, if arbitration is not a "judicial" process in the scientific sense, the use of precedents, *res adjudicata* and *stare decisis* would appear to be inappropriate.

The courts and attorneys have sometimes lost sight of what arbitration is supposed to accomplish and consciously or not, have insisted on applying judicial standards to what is not a "judicial," but rather a "special proceeding." The New York Civil Practice Act defines arbitration as a "special proceeding."[21] Yet for a period of time

19. 61 Harv. L. Rev., *supra*, pp. 1026-1027.
20. Syme, M. Herbert, *Opinions And Awards In Arbitration*, 24 Temple L. Q. 428, 430 (1950-51).
21. N. Y. Civil Practice Act, Section 1459.—The Legislature in New York seems to have maintained a meticulous demarcation between an "action" and a "special proceeding." The Legislative definition in the New York Civil Practice Act of an "action" is (Section 4): "The word 'action', when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice by a party against another party for the enforce-

many lower courts insisted on applying legal characteristics to an arbitration proceeding, holding that arbitration was an "action" within Section 218 of the General Corporation Law.[22] The net result of this kind of thinking was that a corporation was for a time left without remedy in the State of New York upon any contract made by it in the state, on the basis of the erroneous premise that arbitration was a "judicial" proceeding—that is, an "action" within Section 218 of the General Corporation Law. The courts were reluctant to cast off the judicial tentacles that would have allowed one of the parties to maintain an arbitration proceeding—not an action—in New York when it had not qualified to do business in the state.[23]

Happily the Court of Appeals has affirmed a reversal of the lower court in the *Tugee Laces* case (though without opinion) and a more recent lower court has felt constrained to adopt this more enlightened ruling.[24]

In a Texas case antedating the New York Court of Appeals decision the court held that arbitration was not an "action" under a restrictive statute substantially like that of New York.[25] The Court's opinion in this respect reveals an acute insight as to the nature of the arbitration process (p. 609):

> "The function which is developed upon the court by the arbitration statute is not judicial, but the power which is conferred was within the authority of the Legislature to grant. . . . It is our view that the court referred to in the statute from which foreign corporations were excluded is a court exercising judicial powers through officials selected to preside over established

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ment or protection of a right, the redress or prevention of a wrong or the punishment of a public offense." By Legislative definition, a "special proceeding" is not an action. The General Construction Law expressly provides (Sect. 46a): "Every prosecution by a party against another party in a court of justice which is not an action is a special proceeding."

22. *Matter of Vanguard Films* (Goldwyn Productions), 188 Misc. 796, 67 N.Y.S. 2d 893 (1947); *Application of Levys (Gentry, Inc.)*, 73 N.Y.S. 2d 801 (1947), aff'd 276 App. Div. 953, 94 N.Y.S. 2d 924 (1950); *Tugee Laces, Inc. v. Mary Muffet, Inc.*, 73 N.Y.S. 2d 803 (1947), rev'd 273 App. Div. 756, 75 N.Y.S. 2d 513, aff'd 297 N.Y. 914, 79 N.E. 2d 744 (1948).
23. "An arbitration proceeding is not 'an ordinary prosecution in a court of justice'. It is not, therefore, an action." (*Smyth v. Board of Education*, 128 Misc. 49, 217 N.Y.S. 231 (1925). See also *Matter of Callaghan*, 262 App. Div. 398, 28 N.Y.S. 2d 980 (1942), rehearing den. 262 App. Div. 978, 30 N.Y.S. 2d 695, appeal den. 264 App. Div. 812, 35 N.Y.S. 2d 288 (1942).
24. *Avalon Fabrics v. Raymill Fabric Corp.*, 96 N.Y.S. 2d 50 (1950).
25. *Temple v. Riverland Co.*, 228 S.W. 605 (Tex. Civ. App., 1921).

tribunals of justice, and before a court which can force a litigant to come for the adjudication of his rights. It does not mean a board of arbitration created by agreement of the parties. It evidently was not the purpose of the Legislature to deprive a foreign corporation of any right not expressly forbidding it to enforce a legal contract. If the parties make an agreement to settle out of court their dispute arising out of a legal contract, courts of this state will not interfere especially when they follow a method conferred on them by the Legislature. We do not think trial before arbitrators is a 'suit or action' within the meaning of article 1318."

The Court concluded:

". . . in entering into an agreement to arbitrate, the trial before the arbitrators and the award is not within the meaning of the statute, the maintenance of a suit or action in a court of this state, from which a foreign corporation would be excluded. That the judgment entered on the award by the district court was only a ministerial act and not a judicial determination of the rights of the parties, growing out of the original contract made by the parties in this state."

Even if it could, by unwarranted "judicial legislation," be held that a "special proceeding" in the Supreme Court for the enforcement of an arbitration award was an "action" within the meaning of Section 218 of the General Corporation Law, it should not follow that the prohibition of that section should extend to proceedings before private bodies and before there has been any resort whatsoever to the courts. It would seem more appropriate to assume that parties, in accordance with their contract obligations and good business practice, will abide by an arbitration award in one's own industry, rather than flout it.

The attitude of the lower courts prior to the reversal in the *Tugee Laces* case, *supra,* is but one instance where the court has, consciously or not, applied judicial standards and concepts to the arbitration process. It will be seen that many other courts have done much the same thing—motivated, primarily, it would seem, by a desire to mold the arbitration process into the extant judicial framework. Judge Benjamin Cardozo has noted the efficacy of this type of motivating force:[26]

"I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these

26. *The Nature of the Judicial Process,* p. 167 (New Haven, 1921).

forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make the man whether he be litigant or judge."

The application of legal standards by the courts is not, however, warranted inasmuch as the arbitration process is not similar to a court proceeding. The arbitrators need not render their award on the basis of law and the weight of the evidence. "Arbitrators are restricted by no rules of law and they may consider any evidence submitted to them. . . ."[27] An award, for its validity, would seem to require only the observance of certain minimum standards necessary to insure a fair and impartial disposition of the merits of the controversy.[28]

The classic expression of the role of the arbitrator is found in the leading case of *Fudickar* v. *Guardian Mutual Life Ins. Co.*, where the court stated:[29]

"Awards will not be opened for errors of law or fact on the part of the arbitrator. Arbitrators may, unless restricted by the submission, disregard strict rules of law or evidence and decide according to their sense of equity."

In arbitration, the arbitrators are not restricted to consideration of only such evidence as parties see fit to produce.[30] Moreover, there is no rule which requires that testimony in the proceeding be taken down and transcribed so as to enable a court to review rulings upon testimony and points of law.[31] There is not even a provision which makes the swearing of witnesses an essential part of the procedure.[32]

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27. *Matter of Springs Cotton Mills (Buster Boy Suit Co.)*, 275 App. Div. 196, 88 N.Y.S. 2d 295, (1949), aff'd 300 N.Y. 586, 89 N.E. 2d 877 (1949), rearg. den. 300 N.Y. 680, 91 N.E. 2d 330. *In re Landegger*, 54 N.Y.S. 2d 76, 77, (1945), mod. 269 App. Div. 736, 54 N.Y.S. 2d 701 (1945). As indicated *infra* the courts have on many occasions paid lip service only to such a principle.
28. *Scholler Bros. v. Otto A. C. Hagen Corp.* 158 Pa. Super. 170, 44 Atl. 2d 321 (1945).
29. 62 N.Y. 392 (1875).
30. *Matter of Springs Cotton Mills (Buster Boy Suit Co.)*, *supra*, p. 200. "Nor are (arbitrators) restricted to a consideration of only such evidence as the parties see fit to produce, unless, of course, the submission so provides."
31. *A. O. Anderson Trading Company v. Brimberg*, 119 Misc. 784, 197 N.Y.S. 289 (1922).
32. *Hano v. Isaac H. Blanchard Co.*, 199 N.Y.S. 227 (1922).

In view of such distinctions, it appears clear that the arbitration process is not a "judicial" one in the scientific sense. The arbitration process does not, as a judicial process demands, "move within the framework of relevant legal rules and the covenanted modes for ascertaining them.[33]

Yet some courts have actually thwarted the function of the arbitration tribunals by the application of judicial concepts.[34] Calling arbitration a "judicial" proceeding may be responsible for the application by the courts of legal norms attendant in a court proceeding. The word "judicial" is a general and vague word with "righteous" emotive meaning. Utilizing it, however, in such a fashion without an explicit recognition of how it is being used may often serve to bring into being associations and criteria of the courtroom and of the law. By an almost imperceptible process, the scientific meaning emerges and is erroneously applied by a court steeped in its own legal traditions.

The net result of this kind of thinking has sometimes been to nullify the basic function of the arbitration process. Instead of the settlement of disputes with finality in an informal and non-technical way as the parties had initially intended and agreed, the arbitration process becomes but one additional step in a maze of litigation—the *reductio ad absurdum* of the original motive for the utilization of the proceeding. As Judge Medalie once stated:[35]

> "Under the new statute arbitration became both orderly and enforcible and was made subject in effect to a decree for specific performance. A quarter of a century of its operation has demonstrated its usefulness and general acceptability. To work well it must operate with a minimum of delay and with all the flexibility which equity can give it."

To be sure, those courts which have upset awards too alien to their own legal heritage have not always done so in just that way or in just so many words. They have instead done so by one of many methods of rationalization, justifying their position by a devious

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33. Judge Felix Frankfurter's opinion for non-participation in the case of *Public Utilities Commission of the District of Columbia v. Franklin S. Pollak and Guy Martin*, 343 U.S. 451, 466 (1952).
34. "Arbitration's principal claim to merit as a means for the settlement of disputes are promptness and finality. This would be destroyed if questions of fact and law could be reviewed as though on appeal from judicial findings." (*Pine St. Realty Co. v. Coutroulos*, 233 App. Div. 404, 407-8, 253 N.Y.S. 174 (1931).
35. *In re Feuer Transp. Inc.*, 295 N.Y. 87, 91, 65 N.E. 2d 178, 180 (1946).

chain of reasoning.[36] In some instances such a rationalizing process was fortunately detected by an Appellate Court. In one case the Trial Term vacated an arbitrators' award, stating:[37]

> "It follows that the arbitrators evidently miscalculated the deliveries alleged to have been made and therefore so imperfectly exercised their powers that a mutual, final and definite award based on the subject matter submitted was not made."

The Appellate Division, however, reinstated the arbitration award and put its finger on the rationalization of the Trial Term:[38]

> "The objections to the award are based rather upon the theory that it was contrary to the evidence before the arbitrators, a question on which the court cannot pass, than on the ground 'that a mutual, final and definite award upon the subject-matter submitted was not made.'"

In another case the Appellate Division upset the Trial Term's decision and confirmed an arbitration award because in the Court's words:[39]

> ". . . the Court at Special Term not only inquired into the facts, but has reviewed the law and denied the motion to confirm the award of the arbitrator on its independent determination of the facts and the law."

It is submitted that the scientific concept of the arbitration process as a non-judicial proceeding in which expert layman may be the arbitrators compels the conclusion that the Appellate Division correctly decided these cases.[40]

Surprisingly enough, even the Court of Appeals has not always been free from error in this respect, having, on several occasions, insisted upon the application of legal ratiocination to vacate awards

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36. L. J. Henderson has pointed up the potency of language as an aid to rationalization, stating in *Pareto's General Sociology*, p. 39 (Cambridge, 1945): "Nearly all speech, whether in the form of conversation or of oratory or of debate *** is full of derivations, i.e. 'rationalizations'. This theorem holds for all men always, everywhere. It is a useful one for those who can apply it to their own behavior as well as to the behavior of others. But to do so is difficult, for pleasure in one's own derivations is no small part of the pleasure of speaking and writing and the sentiments form a barrier to the opportune recollection and use of the theorem."
37. *Arcola Fabrics Corp. v. Brenda Modes*, 72 N.Y.S. 2d 700, 701, (1947), rev'd 273 App. Div. 891, 78 N.Y.S. 2d 46 (1948).
38. *Arcola Fabrics Corp. v. Brenda Modes*, 273 App. Div. 891, 78 N.Y.S. 2d 46, 47 (1948).
39. *Motor Haulage Co. v. Int. Brotherhood*, 272 App. Div. 382, 71 N.Y.S. 2d 352 (1947) rev'd. on another ground 298 N.Y. 208 (1948).
40. One of the most enlightened expressions of the non-judicial nature of the arbitration proceeding is found in the *Matter of Fidelity and Deposit Co. of Maryland*, 234 App. Div. 823, 253 N.Y.S. 583 (1931).

"out-of-line" with what it would have itself decided on the basis of the law involved. Indeed the Court of Appeals once candidly stated that "equity can afford relief if that under the arbitration law has failed."[41]

In the interesting case of *Matter of Marchant* v. *Mead-Morrison Mfg. Co.* the arbitrators rendered an award of almost $850,000 in favor of the buyer against a seller who had defaulted in the performance of its contract on the theory that such default had brought about the bankruptcy of the buyer.[42] Appalled by a decision which seemed to violate a deeply-ingrained judicial concept, Judge Cardozo, speaking for the majority of the Court, upset the award on the ostensible ground that the arbitrators had no power to award damages under the submission.

The actual reason, however, for upsetting the award may have been something quite different, as even the majority opinion seems, at one point, to have recognized:[43]

> "The rule has long been settled that recoupment in its proper sense does not include a claim for damages purely consequential, but is limited to an allowance for diminution in the value of the subject matter. . . . We go no further than to hold that the distinction answers in this instance to restrictions that may reasonably be supposed to have been in the minds of the contracting parties, ..."

Judge Crane, in a partial dissent, conceded that the award was within the scope of submission but thought that it should, nevertheless, be remitted because the damage assessed was "too speculative," and not in accord with the "ordinary measure of damages".[44] Only Judges Pound and Hubbs voted to reinstate the award.

As a matter of fact, it is difficult to square the Court of Appeals decision in this case on either view with the language employed by the Court of Appeals in an earlier case where the court said:[45]

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41. *Schafran and Finkel, Inc. v. Lowenstein and Sons, Inc.* 280 N.Y. 164, 172, 19 N.E. 2d 1005 (1939), rearg. den. 280 N.Y. 687 (1939).
42. 252 N.Y. 284, 169 N.E. 386 (1929), rearg. den. 253 N.Y. 534 (1930). In the opinion Justice Cardozo stated that the judgment of the arbitrators within the lines of the submission is not to be impeached for misconception of the law, and yet, it is submitted, upset the award for just that very reason.
43. *Matter of Marchant v. Mead-Morrison Mfg. Co., supra,* pp. 300-1.
44. Judge Crane stated at pp. 306-7: "Conceding that the arbitrators were not confined to the rigid rules of law and that they might consider losses consequent upon the expenditure *** yet it is beyond all reason to charge up to the failure to get five hundred tractors the loss of the capital of the business. This is entirely too speculative ***."
45. *Matter of Wilkins,* 169 N.Y. 494, 496-497, 62 N.E. 575 (1902).

"Where the merits of a controversy are referred to an arbitrator selected by the parties, his determination, either as to the law or the facts, is final and conclusive, and a court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is plainly established, or there is some provision in the agreement of submission authorizing it. The award of an arbitrator cannot be set aside for mere errors of judgment, either as to the law or as to the facts. If he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, it is unassailable, operates as a final and conclusive judgment, and however disappointing it may be the parties must abide by it."

It will not do to justify the court's action in upsetting awards of arbitrators on the law with the statement that the courts are better geared to dispense actual justice. After all, the parties themselves agreed beforehand that the dispute should be kept away from the courts and in the hands of arbitrators. It is this type of thinking which may be responsible for dissatisfaction sometimes voiced by the layman as to the role of the courts and the bar in respect to the arbitration proceeding. Such ratiocination may understandably be confusing to the layman who had expected a speedy, non-technical determination and who had received instead a lesson in law from a court, long after the arbitrators had rendered a futile award.

In the recent case of *Matter of Allen* (*Jayne*) the Court gave unanimous expression to its proper role in relation to the arbitration award, stating:[46]

"Even if a court would feel that it would not be reasonable to view the record as bringing the case within the situation specified under the contract warranting a discharge before arbitration, . . . the award here could not be disturbed because the contract gave the arbitrator the right to interpret its terms in relation to the conduct of the parties under it, and his interpretation whether a court thinks of it as being logical or illogical, was binding on the parties."

As we have seen, the courts have not always been so discerning in their actual decisions.

The legislature in the State of New York has taken into account

46. 279 App. Div. 444, 110 N.Y.S. 2d 609, 611 (1952): "Errors, mistakes, departures from strict legal rules, are all included in the arbitration risk and 'perverse misconstruction', includes none of these in its categories." (*Matter of Pine St. Realty Co., Inc. v. Coutroulos,* 233 App. Div. 404, 253 N.Y.S. 174, 177, 1931).

the non-judicial characteristics of the arbitration process.[47] In interpreting such legislation, however, the courts have sometimes been prone to go beyond the legislative edicts to usurp the prerogatives of the arbitrators. In Section 1462(a) the legislature sets forth by number three specific cases only where the court may modify an award and then, in respect to such three cases, states that "the order may modify and correct the award so as to effect the intent thereof and promote justice between the parties".

The latter proviso, clearly operative in only three specific and numbered situations thereinbefore set forth, has also been seized upon by the courts to upset an award on legal grounds as though it had an independent standing. The Courts have been enabled to do this by disregarding the obvious intent of the legislature and considering the proviso as a distinct and separate ground for interfering with the arbitrator's award. An example of this kind of thinking is furnished in *Modernage Furniture Corporation* v. *Weitz,* where the court semed to think that 1462(a) gave it the power to "modify and correct the award so as to effect the intent thereof and promote justice between the parties." By this medium the court felt justified in then applying a legal principle to thwart the arbitrator's award. The court stated:[48]

> "It is needless to point out that the arbitrator had no authority to make such disposition of the matter and having found Brothman guilty of the charge he should have reached the only *legal* conclusion possible, that is, that the employer had the right to discharge Brothman."

In such ways the courts are sometimes enabled to usurp the function of the arbitrators by sizing a matter up for confirmation and foisting on it concepts which square with their own legal standards. Normally, as we have seen, such usurpation does violence to the businessman's concept of arbitration. Thinking that he has done away with legal niceties and technicalities by providing for the speedy remedy of arbitration, the average businessman finds himself

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47. Section 1462 and 1462(a) of the Civil Practice Act. Some of the statutory grounds for vacating or modifying the award of an arbitrator are awards procured by corruption or fraud; where the arbitrators are partial or guilty of misconduct or where they exceed their powers; where the arbitrators make an evident mistake of figures or in the description of a person, thing or property alluded to in the award; where the award is based on a matter not submitted to them; and where the award is imperfect in a matter of form only.
48. 64 N.Y.S. 2d 467, 469 (1946; emphasis the author's).

immersed in a prolonged litigation actually decided on technical, not necessarily practical principles.

Still another type of rationalization has been used by courts who have employed a fiction of "constructive fraud" to vacate awards with which they are not in sympathy. Since they are unable to utilize openly what they conceive to be error as a basis for reversal, they achieve the same result by employing a legal fiction, "constructive fraud." Such a practice of self-dissimulation has been noted and criticized by a discerning court in Minnesota.[49]

> "There is general agreement in the proposition, whatever it may mean, that when an award is so grossly inadequate or excessive as to amount to fraud, it may be vacated. It is the writer's opinion that it is a mistake in such cases to pretend adherence to the concept of fraud in delimiting the grounds for impeachment."

An instance of the businessman's viewpoint can be seen in the case of *Acme Cut Stone Co.* v. *Nece Center Development Corp.*[50] where the plaintiff sought to upset the arbitrators' award on the ground that such award was based upon legal, rather than equitable, principles. To be sure, the position taken by the plaintiff may have been extreme, and the court so held. Nonetheless, it is important as an indication of the businessman's viewpoint and must be seriously taken into account by the courts and philosophers on the theory and practice of arbitration.

Of course it is the intent of the parties which controls. If the parties specifically state that they wish the award to be rendered in accordance with principles of law, clearly such intent should be zealously protected. In the absence of an express intent, it seems more in keeping with what the everyday businessman actually had in mind to presume that they intended practical rather than technical and legal principles to form the criteria for the arbitrator. Indeed, how can an arbitrator who is not trained in the law possibly be expected to apply legal principles?

If the arbitration process is to serve its legitimate function as a speedy social expedient, it does not make good sense to upset an award based upon either legal or practical and businesslike principles. To allow the courts, in effect, to review the basis for an award is to stultify the arbitration proceeding and contrary to the intention of the parties in their submission.

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49. *Kaufman Jewelry Co. v. Insurance Co. of State of Pennsylvania,* 172 Minn. 314, 317-318, 215 N.W. 65, 67 (1927). See also *Putterman v. Schmidt,* 209 Wisc 442, 451, 245 N.W. 78 (1932).
50. 281 Mich. 32, 274 N.W. 700 (1937).

As the Court of Appeals once stated in a lucid opinion:[51]

"To hold that any court, appellate or other has the right to review the action of an arbitrator upon the merits of a controversy submitted to him, would entirely subvert the whole system and principle of arbitration and transfer to courts powers which the parties themselves have expressly confided to arbitrators, and that, too, without their consent."

Of course, if it is patent that the arbitrator has actually decided on the basis of the law, and such conclusion is erroneous as matter of law, the court will set the award aside. In such a case "the award is not what the arbitrators themselves intended."[52] But even here the court should exert great care to determine (1) whether the arbitrators intended to apply legal principles and (2) whether the award is based on a clear error as matter of law. Unless the court is explicitly aware of the latent danger of imposing its own legal standards, the principle may easily be utilized as a medium of rationalization. Obviously, all the court need do here, if it did not like an arbitration award, would be to read into the contract an intention on the part of the parties to have legal principles control. The court would then be enabled to upset the "unfair" award of the arbitrators, if it did not in fact meet the legal niceties of the situation.

The case of *Reid & Yeomans, Inc.* v. *Drug Stores Employees Union* is revealing as an unusually candid picture of the way in which a court will strain to impose its own legal standards on an award of the arbitrators.[53] In that case the court started with the premise that "it seems to be the meaning of the contract that the arbirator shall decide, not as a court would decide, namely, on the law alone, but decide what in justice and fairness and equity and good conscience should be done . . . ." The court then stated:

"It is quite evident from the papers that the referee did not proceed in this direction. His approach was that of a lawyer looking at the legal meaning of the contract. . . . Where an arbitrator who is to decide, not on the law alone, but on the whole situation, proceeds to decide this kind of question on the law, and it is apparent that his conclusion as to the legal meaning of the contract is not in accord with the court's opinion of the law, the court has the power to judge the award from the standpoint of the law."

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51. *Matter of Wilkins*, 169 N.Y. 494, 500, 62 N.E. 575 (1902).
52. *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392, 400 (1875).
53. 29 N.Y.S. 2d 835, 836 (1941), aff'd. 265 App. Div. 870 (1942).

The court concluded that it therefore felt free to apply "the law of this state," rejecting the award and directing that a new arbitrator be appointed. If the court was right in deciding that the arbitrator intended a "legal" result, there would appear to be no grounds for criticizing this decision. On the other hand, a word of caution in regard to this approach may be advanced, lest it be utilized as a means for rationalizing the vacating of awards with which the courts are not sympathetic. Normally, the courts would be inclined to feel that a "just" result is a "legal" result. Calling the arbitration process a "judicial" proceeding serves to magnify and intensify this feeling.

Perhaps the most interesting illustration of the proclivity of the courts to impose legal criteria and the role assumed by the emotive word "judicial" in making this result possible is evident in the very recent matter of the arbitration between *Publishers Association of New York City and Newspaper and Mail Deliverers Union of New York City and Vicinity.*[54] In this matter the Appellate Division upset an arbitrators' award, confirmed by Special Term, which had, concededly, given expression to the "intention of the contracting parties." The Appellate Division, in a three to two split, refused to enforce a penalty which the parties had intended to be imposed, in addition to actual damages, on the grounds that it did violence to a legal concept. Essential to the Court's decision was the assumption by the majority that arbitration is of a "judicial" nature. How else explain the application of legal criteria to vacate the arbitrators' award? To achieve this result, the court stressed time and time again the "judicial" aspects of the problems involved. After tracing the "judicial" history of the concept of punitive damages and the "theory behind the judicial opinions," the court concluded:[55]

> "The court has always regarded itself competent to inquire whether the result that arbitrators have worked out has been consistent with the public and legal policy of the community."

Public policy, yes. Such candor, however, in respect to the "legal policy," as a motivating force was, it is submitted, more a matter of necessity than of choice. In the face of the classic statement of Judge Cardozo, in *Loucks* v. *Standard Oil Co.*,[56] that "we have no public policy that prohibits exemplary damages or civil penalties," the court

54. 280 App. Div. 500, 114 N.Y.S. 2d 401 (1952).
55. 280 App. Div., *supra.*, p. 505.
56. 224 N.Y. 99, 112 (1918). This case was cited in both the majority and minority opinions.

had no alternative but to admit the potency of its legal heritage:[57]

> "It has been seen that in an action at law the court would not send any such agreed measure of damage to a jury. . . . We are of opinion that the penalty provision of the contract is unenforcible under any admissible theory under our law even though a separable finding of actual damage for breach could be made."

The dissent of two judges in this matter is especially searching and, it is submitted, sound. After observing that the award does not offend public policy, it is stated:[58]

> "We are dealing with an award in arbitration as to which the legal rules of damage have no application . . . the rules limiting damages in civil actions grow out of judicial interpretation. Arbitrators have no rule of *stare decisis*."

In fact, the dissent continues: "It is just as much the public policy of this state that arbitration awards within the limit of the submission are not to be impeached for misconception of the law." Moreover, the dissent points out that the legislature did not specify the ground of excessive or improper damages as a basis for vacating an award. The dissent continues.[59]

> "We consider it our duty to follow the legislative directive and confirm the award so long as the arbitrators kept within the limit of their conferred powers, even though a court might not award damages in the same amount or of the same nature in an action at law."

The repeated use of the word "judicial" by the majority of the judges may not be by design, but it is also not accidental. What better way to help persuade themselves as well as others of the propriety of reaching legal conclusions which, subconsciously perhaps, they would have preferred to reach in the first place. Applying the word "judicial" emotively to the arbitration process has its dangers. It may serve to stimulate and foster the misconception that that scientific meaning is being utilized, such misconception bringing in its wake an inevitable coterie of legal norms and associations, which are then applied willy-nilly. This blurring of the emotive and scientific meanings of the term "judicial" results, in the court's words, in the "imposition of judicial policy against the effectiveness of an arbitration agreement."

The predisposition of the courts to mold the arbitration process in accordance with their own legal framework is also evident in their

57. 280 App. Div., *supra*, p. 507.
58. 280 App. Div., *supra*, p. 509.
59. 280 App. Div., *supra*, pp. 510-511.

attitudes to the extension of procedural legal machinery to arbitration. It may be seriously questioned, as it has been, that such an extension to the arbitration process is meritorious. As regards examinations before trial the courts have gone both ways.[60] The "utter incompatibility of arbitration and an examination before trial" was ably pointed up by one court, stating:[61]

> ". . . it is difficult to see how there can be an examination before trial under the circumstances presented and retain any semblance of orderly procedure. To begin with, these parties have agreed to remain out of court. They have refused to allow the processes of the court to be applied to their dispute. The method of settlement to which they have subscribed dispenses with the law of evidence. Is their agreement to ignore the rules of evidence to prevail when the deposition is being taken or shall they have those rules inflicted upon them? The latter is what they agreed to avoid. What rules would a court apply if during the taking of the deposition the court were importuned to pass upon an objection? . . . It is plain that the examination before trial here sought would be farcical and a mockery."

The methods and judicial norms of the courts are not, however, easily abjured.[62] Another New York court has insisted upon the inclusion of the examination before trial in the arbitration machinery, even though the proceeding is thereby prolonged and sometimes needlessly confused.[63] The arbitration process should be and can be efficient, but speed, economy, privacy, finality and good-will must not be altogether sacrificed, if we desire to retain arbitration at all.[64]

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60. Domke, Martin, *Arbitration,* 28 N.Y.U.L. Rev. 835, 846, (1953): "The issues often arising in practice of whether an examination before trial can be had by parties to an arbitration, remains much disputed. The trend seems to be that the discretion of the court 'if any exists, should be exercised to refuse the right.' "
61. *Kallus v. Ideal Novelty and Toy Co.,* 45 N.Y.S. 2d 554, 555 (1943).
62. In his book, *Law and the Modern Mind,* (New York, 1936) Jerome Frank, now a Federal Circuit Judge, expressed an awareness of the latent danger involved in the carry-over of legal characteristics to the arbitration movement, stating (footnote, p. 181):
    "Unfortunately precedent-worship has injected itself into that movement and is likely to destroy whatever of value there is in the experiment."
63. *Avon Converting Co. v. Home Insurance Co.,* 196 Misc. 886, 93 N.Y.S. 2d 90 (1949). In *Smyth v. Board of Education,* 128 Misc. 49, 217 N.Y.S. 231 (1925), however, the court held that a bill of particulars could not be demanded in arbitration, a special proceeding, and that arbitration does not purport to assimilate the technical practice of courts of law.
64. "Today the desire of all the American people for unity of purpose, for friendly cooperation in the job to be accomplished, and for speed in its execution, will be a powerful force in the acceleration of the use of arbitration. Its economy in both time and money, its inducement to

Some of the more obvious implications that flow from the non-judicial nature of the arbitration process would appear to be these:

In the first place, the arbitrators are more free to resolve a particular dispute between parties without resorting to extraneous public policy considerations. This is not to say that such policy considerations do not or should not play some role in their decisions. But the emphasis on such policy considerations is far less than it is in the courts. As we have seen, the thinking of the courts is generally geared to systematization and the effect of its decisions as precedents on future hypothetical litigants.[65] As Judge Jerome Frank has pointed out in a concurring opinion:[66]

> "Perhaps the central theme in most discussions of the judicial process is the obligation of judges to consider the future consequences of their specific decisions. Such discussions usually stress the 'rule' or precedent aspects of decisions."

And, sometimes, unfortunately, Judge Frank points out, "the interests of the parties to cases actually before the court are thus sacrificed to the shadowy unvoiced claims of the supposed litigants in future litigation which may never arise."[67]

Not so with arbitration. Arbitrators, not weighed down by precedent and *stare decisis*, are able to concentrate on the disputants before them in a restricted sphere of activity. M. Herbert Syme has voiced the distinction this way:[68]

> "The common law is the law for all citizens. Arbitration is the law for one particular group of individuals in one factory at one elusive moment in their industrial history."

This difference between the courts and the arbitrators would appear to follow from the fact that arbitrators are not judges in the scientific meaning of the term.[69] In the words of one court:[70]

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friendly disposition of disputes, its avoidance of the uncertainties of jury trial may well make this 'peaceful revolution in our midst' a most important part of our system of the administration of justice." (Carey, L. J., *Arbitration, Its Place In Today's Disputes,* 5 University of Detroit L. J., 180, 188 (1942).

65. "The good remains the foundation on which new structures will be built." (Cardozo, Benjamin, *The Nature of the Judicial Process, supra,* p. 178).
66. *Aero Spark Plug Co. v. B. G. Corporation,* 130 F. 2d 290, 294 (C.C.A. 2nd, 1942).
67. *Aero Spark Plug Co. v. B. G. Corporation, supra,* p. 295.
68. Syme, M. Herbert, *Opinions and Awards In Arbitration,* 24 Temple L.Q. 428, 442 (1950-51).
69. "Arbitrators *** are not judges, constrained to proceed in strict conformity with the principles of law respecting evidence, damages or the like." (Dissenting opinion, *Atchison, T. & S. F. Ry. Co. v. Brotherhood of L. F. & E.,* 26 F. (2d) 413, 431 (C.C.A. 7th, 1928).
70. Majority opinion, *Atchison, T. & S. F. Ry. Co. v. Brotherhood of L. F.*

". . . we might have assumed that the arbitrators had no public duty to perform but acted solely as representatives of the parties, finding their sole authority to proceed in the written agreement."

Another corollary would appear to be that the arbitrators cannot and should not deal with agreements which, if performed, would contravene some well-defined public policy of the community. In this connection the United States Supreme Court once had occasion to say:[71]

"It may be that arbitration is well adapted to the needs of the . . . industry, but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition, the action becomes illegal."

In *Matter of Kramer & Uchitelle, Inc.*, the New York Court of Appeals stayed arbitration proceedings where the parties had entered into a contract to buy cotten grey goods at a certain price, which price was in excess of the maximum price thereafter issued by the Price Administrator. The court held there was a complete frustration of performance which excused the seller from performing the contract as matter of law, since controlling public policy barred delivery at the price agreed upon, stating:[72]

"As of the precise time when the remedy was invoked, it was to be determined whether public policy prohibited enforcement of the contracts according to their terms. The price at which the goods were to be sold as of the time of delivery was as much of the essence of the contract as any of its other provisions and controlling public policy barred delivery at that price. By act of government there was complete frustration of performance excusing the seller from performance as matter of law."

It is interesting to note that the court felt that such public policy considerations overrode the discerning insight of Judge Lehman as to the relationship of the courts to the arbitration process:[73]

"The parties have agreed to submit questions of what is just to business men 'untrained in the distinctions of the law.' The courts should not assume to decide according to legal principles a controversy which the parties have agreed should be decided otherwise."

&*E., supra*, p. 420. Of course, as representatives of the parties, it is not meant that they are advocates for the respective disputants, but only that they are designees to render what they conceive to be a just award.

71. *Paramount Famous Lasky Corp. v. U. S.*, 282 U.S. 30, 43 (1930).
72. 288 N.Y. 467, 472 (1942).
73. 288 N.Y. 467, 475-6.

In most cases, fortunately, the line of demarcation between the private business disputes of the parties and questions of public policy is sharply drawn.[74] In such cases application of arbitration is usual and beyond dispute. In corporate law matters, however, where the public policy aspects are more pronounced, it is not too clear what is and what is not arbitrable. To the extent that there are strong public policy considerations, the courts have generally felt it necessary to control an arbitrator's award. The difficulty, of course, is in trying to determine whether or not the element of public policy in each particular case is or is not so great as to compel wresting the matter from the hands of arbitrators. It is not too difficult for the judges to reach the conclusion that the arbitrators may be impinging on issues which ought better be left to the courts. The word "corporation" is itself ambiguous, embracing two distinct concepts—viz., that of the "public" corporation and that of the "close" corporation. Moreover the words "public policy" have significant emotive content.

By utilizing words like "public policy" in connection with "corporate" problems, the courts can avail themselves of the norms and concepts of "public" corporations to reject the role of arbitration to problems of "close" corporations.[75]

Arbitration and Close Corporations

The extent of the applicability of arbitration to corporate problems is not altogether clear. One writer has commented that arbitration is incompatible with corporate problems in view of legislative mandates and the public interest necessarily involved.[76] This would seem to be an extreme and unwarranted conclusion. It would appear necessary at least to differentiate between a "public" and a "close" corporation before arriving at any final opinion. The basic issue is whether the arbitration concept is incompatible with the legislative pronouncements of public policy by virtue of the fact that decisions may be rendered by the arbitrators rather than the directors of the corporation. The argument proceeds on the theory that such delegation to arbitration flouts that part of Section 27 of the New

74. "It is not likely that the expansion of arbitration will lessen in any way the need for courts. *** The constantly changing economic and social conditions bring new problems of law and policy, which only courts can decide." (L. J. Carey, *supra*, p. 188).

75. "Public policy is a very unruly horse and when once you get astride it you never know where it will carry you." *Richardson v. Mellish*, 2 Bing. 229 (1824).

76. Kronstein, Heinrich, *Business Arbitration-Instrument of Private Government*, 54 Yale L.J. 36-69 (1944).

York General Corporation Law which states that "the business of a corporation shall be managed by its board of directors. . . ."

In the year 1942 this thought was given expression in a matter where the Court declared an arbitration agreement void as against public policy and said:[77]

> "A director may not divest himself of the obligations of his office by vesting the exercise of his discretions in an arbitrator. Neither stockholders nor directors can surrender their obligations and functions as such for determination by arbitration. Management of a corporate enterprise by arbitrators is repugnant to the concept of corporate structure."

A major impediment to the relaxation of the usual corporate norms to all corporations is actually the language used. Calling both publicly held corporations and "close" corporations by the generic term "corporations" is apt to result in the application of the same standards for both, although the two concepts may have different "scientific" meanings. It is not always recognized that there are actually different conceptual meanings to organizations described by the same word. In one case a discerning New York Court pointed out "that the word 'corporation' has a variable, not a constant, meaning."[78]

Edmund Burke noted the potency of terminology to evoke associations, stimulated more by hidden subconscious processes than by reason:[79]

> ". . . it is hard to repeat certain sets of words, though owned by themselves inoperative, without being in some degree affected. . . . And it requires in several cases much good sense and experience to be guarded against the force of such language."

Such would seem to be particularly true as regards legal concepts, as Karl Llewellyn has pointed out. He states as regards this phenomenon:[80]

> ". . . categories and concepts, once formulated and once they have entered into the thought processes, tend to take on an appearance of solidity, reality and inherent value which has no foundation in experience. More than this: although originally formulated on the model of at least some observed data they

77. *Matter of Hess,* 108 N.Y.L.J. 555, Sept. 11, 1942, Col. 5.
78. *Farmers Loan & Trust Co. v. Pierson,* 130 Misc. 110, 119 (1927).
79. Burke, Edmund, *An Essay On The Sublime And The Beautiful,* p. 179 (New York, 1887).
80. Llewellyn, Karl, *A Realistic Jurisprudence—The Next Step,* 30 Col. L. Rev. 431, 453-4 (1930).

tend, once they have entered into the organization of thinking, both to suggest the presence of corresponding data when these data are not in fact present, and to twist any fresh observation of data into conformity with the terms of the categories. . . . It is peculiarly troublesome in regard to legal concepts, because of the tendency of the crystallized legal concept to persist after the fact model from which the concept was once derived has disappeared or changed out of recognition."

And Llewellyn goes on to point up a suggested remedy: "The counsel of the realistic approach here, then, would be the constant backchecking of the category against the data, to see whether the data are still present in the form suggested by the category-name."

It is an altogether natural assumption that close corporations and public corporations—both called "corporations"—have the same scientific meaning. The scientific meaning, utilizing our descriptive term, of a close corporation has been trenchantly expressed as follows:[81]

"The true concept of the close corporation is found in the nature of its attributes and the purposes of its formation rather than in any attempt at definition. It is usually composed of a few stockholders who have chosen the corporate form of doing business to avoid some of the disadvantages of the partnership, usually the unlimited liability peculiar to that entity. The members seek to establish an organization that is a corporation to the world but a partnership among the stockholders themselves. The individuals involved usually embody all the corporation's needs as to management, trade skill, capital, etc. and hold their stock only as evidence of their share of ownership. Dividends to the stockholders in the close corporation are not his main interest; in fact, they are seldom, if ever, declared. He looks to his salary as his return on his investment and wishes to protect this investment by exercising control over the management and policies of the corporation. Stock certificates to him, therefore, are no more than the indicia of voting power."

The disputes in close corporations are, in fact, not dissimilar to those between partners and public policy considerations are not ordinarily substantial. In fact, the courts have sometimes specifically invoked the scientific definition of the close corporation in referring

81. 23 St. Johns L. Rev. 372-3 (1949).

to it as an "incorporated partnership."[82] There would, accordingly, seem to be no sound basis for holding an arbitration clause invalid *per se* on the ground that it constitutes an improper delegation of the managerial function. Certain corporate norms pertinent to publicly held corporations may be "out-of-place" in an organization which is essentially a partnership. Obviously, public policy considerations are entirely pertinent where the stockholders and management are not the same; but such considerations would appear to be unimportant and, perhaps, irrelevant in "close" corporations where the stockholders and the management are the same and where the stock is not diffusely held.

Hornstein has indicated an essential difference as follows:[83]

> "In a typical close corporation the stockholders' agreement is usually the result of careful deliberation among all initial investors. In the large public-issue corporation, on the other hand, the 'agreement' represented by the corporate charter is not consciously agreed to by the investors; they have no voice in its formulation, and very few ever read the certificate of incorporation."

The failure to differentiate properly between the two kinds of corporations has been aptly characterized as a "blindness which has made the advocates of each unaware of the fact that there are corporations and corporations, and that the problems, needs and dangers involved in one may not be present in the other."[84]

As one commentator has succinctly stated:[85]

> ". . . it must be remembered that to look upon a close corporation in its proper light, it is a corporation *de jure* but a partnership *de facto*. The basis of the rule invalidating separate agreements when applied to the close corporation becomes untenable and impractical, for in such an entity we expect the stockholders and directors to be the same individuals. It is true that the rule is based upon the fact that directors owe their primary duty to the corporation; but, where the directors and the corporation are practically identical, it is manifest that it should not apply."

Since the "close" corporation is essentially an "incorporated

82. *Cuppy v. Ward*, 187 App. Div. 625, 639, 176 N.Y. Supp. 233, aff'd 227 N.Y. 603, 125 N.E. 915 (1919).
83. Hornstein, George D., *Stockholders' Agreements In The Closely Held Corporation*, 59 Yale L.J. 1040, 1056 (1949-50).
84. Weiner, *Legislative Recognition of the Close Corporation*, 27 Mich. L. Rev. 273 (1928-29).
85. 23 St. Johns L. Rev. 372, 374 (1949).

partnership," the application of the norms of a public corporation to it, particularly in respect to arbitration, is not merited. Corporate law, no less than any other law, is dynamic and our concepts therein should take into account the needs and interests of the society within which we live.[86]

The New York legislature, unlike that of many other states, has already given recognition to the needs of close corporations, making an inroad on what had theretofore been considered a sacrosanct corporate axiom—viz., that the corporation "must" be managed by the acts of the majority of the board of directors. Section 9 of the New York Stock Corporation Law has given expression and approval to the needs of small corporations faced with the necessity of deviating from the rigorous corporate mold theretofore traditionally assumed to be essential. The effect of such section is to nibble away at the concept of the majority rule of directors, provided that the certificate of incorporation reflects the intentions of the stockholders.[87] Accordingly, the stockholders can consent and agree that a different *modus operandi* can be utilized in their business.

Section 9 is geared to the operations of close corporations and its enactment by the legislature is a tacit admission that the public policy considerations of such corporations are not so significant that the desires of the stockholders therein cannot be respected.[88]

There would appear to be no compelling reason why the courts should reject an arbitration provision in a stockholders agreement, *ipso facto,* as an improper delegation of the managerial functions of the corporation. On the contrary, it is submitted that business men should be permitted to adapt the statutory form to the structure they want, so long as they do not endanger other stockholders, creditors

86. In discussing a proposed change in our corporation laws Joseph L. Weiner remarks: "*** some *** change should come sooner or later seems desirable in view of our complex industrial system. If we are to avoid burdening the private company with regulations necessary only for the large, we must sever the small and the large." Weiner, Joseph L., *Legislative Recognition of the Close Corporation,* 27 Mich. L. Rev. 273, 284 (1928-29).

87. Even this requirement reflects the traditional aversion from breaking away and recognizing that the "close corporation" is not the same entity as the public corporation in the scientific sense.

88. "The statute was designed to permit a stock corporation by its certificate of incorporation or an amendment thereof to impose requirements as to quorum or vote, of directors or stockholders, in excess of the requirements that would be applicable by operation of law. *** In its Recommendations in 1948 the Commission pointed out that the restrictions included in section 9 would make use of the statute by publicly held corporations unlikely." (White on New York Corporations, Vol. 3, Twelfth Edition, 1951 Cumulative Supplement, pp. 10-11).

or the public, or violate a clearly mandatory provision of the corporation laws.[89] It may well be said of arbitration as it was said by the Court in *Clark* v. *Dodge*:[90]

> "If the enforcement of a particular contract damages nobody—not even, in any perceptible degree, the public—one sees no reason for holding it illegal, even though it impinges slightly upon the broad provision of section 27."

Yet the courts have time and again refused to give legal effect to the significant differences which exist between the two types of corporations because of the "judicial feeling" against treating a corporation like a partnership.[91] This view has been expressed by courts who feel that persons "cannot be partners *inter sese* and a corporation as to the rest of the world."[92] Calling both types of organization by the same word "corporations" has been a prime source of the confusion. The use of such terminology as "public policy" to invalidate provisions with which the courts are not in sympathy has simplified the courts' task in this respect.

In a note in the Columbia Law Review it has been said:[93]

> ". . . the language and reasoning has served in a great measure to bring about the conflict of authority and the lack of authority now existing. The courts speak of 'public policy' and 'the intention of the legislature' to invalidate all kinds of provisions, even where it is difficult to see how the public is involved or where the legislature has manifested its intention. Such nebulous terminology makes it very difficult to determine why a particular provision is considered objectionable, or to predict the position of a court when faced with a new innovation."

Arbitration is a helpful medium for resolving corporate disputes among stockholders in a close corporation. Accordingly, in general, it would seem more appropriate to extend arbitration to such situations than to restrict its application.[94] It is more in keeping, perhaps, with the spirit of the legislature as expressed in Section 27 of the New York Stock Corporation Law to allow the management of a close corporation to submit a dispute to arbitration to avert total inaction at a time when the corporation is actually not being

89. Hornstein, George D., *supra*, n. 83, 1056.
90. 269 N.Y. 410, 415, 199 N.E. 641 (1936).
91. Rohrlich, Chester, *Organizing Corporate and Other Business Enterprises*, Revised Ed., p. 99 (New York, 1953).
92. *Jackson v. Hooper*, 76 N.J. Eq. 592, 599, 75 Atl. 568 (1910).
93. 28 Columbia L. Rev. 366, 371 (1928), *Validity of Variations From The Norm In Corporate Structure.*
94. In the well-known case of *Ringling v. Ringling Bros.-Barnum & Bailey*

managed at all. Arbitration, on this theory, emerges as a valuable instrument in a dynamic process wherein a corporation, temporarily without active management, may sometimes be enabled to right itself and continue functioning through its board of directors.

It is submitted, then, that there is no basic incompatibility between the concept of arbitration and its applicability in general to the field of close corporations and that intimations and suggestions of the existence of an incompatibility are based on a traditional, but uncritical, reliance on the norms of an organization, unfortunately described by the same term. It would appear to be appropriate to look beneath the shell designated as a "corporation" to ascertain whether or not the substance contained within is actually different from that of "public corporations" before deciding whether a particular corporate dispute is or is not a fit subject for arbitration.

Some courts have adapted the medium of arbitration to corporate disputes, directing their inquiry to the specific provisions for which arbitration is sought in an effort to ascertain whether such provision is or is not valid because of public policy. Such an approach would appear to be sound.

In *Martocci* v. *Martocci,* for instance, the Court utilized the scientific meaning of the close corporation in holding an arbitration clause to be valid and concerned itself with the question of whether or not a sterilized board of directors was created by a provision in an agreement of all the stockholders of a corporation which required that the stockholders of a corporation be retained as officers and employees for life. The Court stated:[95]

> ". . . the corporation in this case was little more than a chartered partnership. The parties to the agreement comprised all the stockholders and directors. They not only constituted the entire capital to the corporation but they owned its shares in equal amount. The rights of neither creditors nor other persons are involved.

Comb. Shows, 49 Atl. 2d 603 (1946), modified in 53 Atl. 2d 441 (Del. Sup. Ct., 1947), the Court held valid a provision between stockholders to exercise their voting rights jointly and if they could not agree, to permit an arbitrator to decide how the stock should be voted. In so holding, the Vice-Chancellor recognized the dynamic import of changing social and business conditions, stating at p. 610: "*** precedents from other jurisdictions which are based on reasons which have, in my opinion lost their substance under present day conditions cannot be accorded favorable recognition. No public policy of this state requires a different conclusion."

95. 42 N.Y.S. 2d 222, 225 (1943), aff'd 266 App. Div. 840, 843, 43 N.Y.S. 2d 516 (1943).

Under such circumstances it has been held that the stockholders may do as they please with their corporate concerns . . . ."

Other courts have guarded against the intrusion of arbitrators to resolve a particular dispute among stockholders of a close corporation—too zealously, it would seem. In one such case a New York court held that an arrangement by brothers in a close corporation to deal with its real property as joint venturers was contrary to public policy and, accordingly, not arbitrable.[96] In another case a New York Court held that a provision that a corporation be managed and operated exclusively by a certain class of stockholders rather than by its directors was too offensive to the public policy of the state and therefore not subject to arbitration.[97]

Another court has held that an arbitration provision entered into between two persons owning equally all the shares of the corporation cannot be utilized to stay an application for dissolution under Section 103 of the General Corporation Law. "No stockholder is required to continue in a state of constant legal warfare with the remaining 50% interest."[98] Still another court, however, denied an application for dissolution under Section 101 and 103 of the General Corporation Law when the incorporators who were also the stockholders and directors agreed to arbitrate any controversy arising out of the agreement between the parties, stating that allegations of mismanagement were required to be arbitrated.[99]

In the *Matter of Wolf Zybert* the Court stayed dissolution proceedings and directed that the parties proceed to arbitration on the question of whether or not the demand of one stockholder for the purchase of another stockholder's stock and steps toward ultimate dis-

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96. *In Re Flanagan's Will*, 271 App. Div. 1014, 68 N.Y.S. 2d 248 (1947), 273 App. Div. 918, 77 N.Y.S. 2d 682 (1948), aff'd 298 N.Y. 787, 83 N.E. 2d 473 (1948).
97. *Abbey v. Meyerson*, 274 App. Div. 389, 83 N.Y.S. 2d 503 (1948), aff'd 299 N.Y. 557, 85 N.E. 2d 789 (1949).
98. Application of Cohen (Michel), 183 Misc. 1034, 52 N.Y.S. 2d 671 (1944), aff'd 269 App. Div. 663, 53 N.Y.S. 2d 467, leave to appeal den'd 269 App. Div. 690, 54 N.Y.S. 2d 389 and 294 N.Y. 639, 61 N.E. 2d 459 (1945). The same consideration is evident in the case of *Bercu v. Levinson*, 270 App. Div. 537, 61 N.Y.S. 2d 116 (1946), aff'd 296 N.Y. 866, 72 N.E. 2d 607 (1947), where the court held that partners cannot compel their copartner to arbitrate a dispute as to whether the firm should be dissolved and a new firm formed under a provision in a partnership agreement for arbitration of partners disputes respecting conduct or the dissolution of the partnership. "*** petitioners may not avail themselves of an arbitration proceeding *** to force appellant to accede to their proposal for a new partnership or dissolution of the present partnership."
99. *Application of Gail Kiddie Clothes, Inc.*, 56 N.Y.S. 2d 117 (1945).

solution were made in good faith or for the premeditated purpose of attempting improperly to gain control of the business for his own personal gain.[100]

The thinking of the courts reflects basic irresolution as a result of two conflicting concepts. On the one hand the courts are reluctant to force someone to remain in a certain relationship against his own will. A court which feels this way will utilize the scientific meaning of the "public corporation" to justify the rejection of the medium of arbitration to a "close corporation." On the other hand some courts evince a desire to allow the parties to work out their differences before a final dissolution. The arbitration process emerges as a practical medium for the effectuation of such a desire. Where there's life, there's hope and in this process the role of arbitration is not an insignificant one.

Ordinarily the arbitrators are called upon to adjust differences which have arisen as to a course of action already taken by the parties.[101] Arbitrators may, however, also operate prospectively—that is, they may be called upon to decide on the merits of a contemplated future act. Thus in the case of *Simonson* v. *Helburn* arbitration was utilized as a medium to prevent and forestall a prospective dispute as to a future act.[102] In that case a proviso was included in a stockholders agreement which would permit certain stockholders in a theatrical venture to engage in personal ventures, provided the question of competition with the Theatre Guild was first passed upon by an arbitrator. In this way the Theatre Guild was enabled to attract talented administrative directors in the original venture. In dismissing the objection that such a provision sanctioned divided loyalty, presumably at variance with a traditional corporate maxim, the Court stated:

> "The arbitration provision is certainly a valid and commendable device for determining any question of divided loyalty before harm occurs. It is intended to bring such issues into the open where they may be aired before an impartial tribunal, to prevent

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100. 276 App. Div. 1070, 96 N.Y.S. 2d 374 (1950), aff'd 301 N.Y. 632, 93 N.E. 2d 917 (1950).

101. Section 1448 of the Civil Practice Act provides that only such existing controversies may be submitted to arbitration "which may be the subject of an action." There is no such limitation with regard to arbitration clauses concerning future disputes.

102. 198 Misc. 430, 439, 97 N.Y.S. 2d 406 (1950). See also *Robinson v. Robinson* 296 N.Y. 778, 71 N.E. 2d 241 (1947).

> the possibility that secrecy or betrayal of fiduciary obligations may later be asserted."

This use of arbitration to guide the parties in a future course of conduct seems meritorious. A decision as to a contemplated course of conduct by a disinterested tribunal before the act has taken place is, obviously, more conducive to harmony between persons who are working intimately together than an arbitration engendered as a result of a past action, presumably questioned by one's associate. Arbitration, as we have seen, is particularly desirable in a situation where the relationship between the parties is an important consideration.

Of course, it is not always easy to predict the attitudes of the courts to the question of whether certain disputes in the corporate field are or are not arbitrable. As time goes on the courts themselves, in their decisions, will afford the corporate practitioner a general yardstick as to those situations where arbitration is valid and helpful. After all, if the law is a dynamic process, constantly readjusting itself to the changes and realities of business life, it must needs take into account the advantages that arbitration can offer the stockholders of "close" corporations where a speedy decision and the preservation of a friendly relationship between the parties may be all-important.[103] At the very least it must be made apparent that when arbitration is rejected, there are valid policy reasons for the rejection and we should be reasonably certain that the decision is not actually based on associations stemming from the application of the same word "corporation" to two basically dissimilar business organizations. The word "corporation" is a name for a useful collection of jural relations but, as one New York Court has so aptly put it, each such jural relation "must in every instance be ascertained, analyzed and assigned to its appropriate place according to the circumstances of the particular case, having due regard to the purposes to be achieved."[104]

Conclusion

Arbitration is becoming a more and more powerful force in our complex business life because it fulfills a need that is not met by the

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103. In an interesting article in 28 Cornell L. Q., 313-343 (1943), *Proposing a New York "Close Corporation Law,"* Norman Winer indicates a crying need for revamping the corporate laws to differentiate between the public and close corporations, proposing a New York "Close Corporation Law."

104. *Farmers' Loan & Trust Co. v. Pierson,* 130 Misc. 110-119 (1927).

courts. It would appear that it is extremely important for the courts, the bar and the businessman to examine closely what the arbitration process is designed to do and their own individual role in the process if mutual respect toward such proceeding and each other is to prevail. To the judge, among other things, such an examination should evoke a lively awareness of the fact that the imposition of judicial norms may defeat the purpose of the proceeding. To the attorney it may mean a conscious direction of his talents away from a technical or legalistic attitude to a more enlightened and educated perspective as to the methods, trade practices and needs of a particular industry or business. To the businessman it may mean the adoption of an attitude which recognizes the problems of the arbitrators and a more cooperative approach to the participants in the proceeding and to the final award of the arbitrators.

To achieve the objectives of arbitration, let us not be misled by any word-magic. The emotive word "judicial" has been a helpful medium for enabling the courts, and attorneys too, to justify to themselves as well as others, actions motivated by their own preferences and past associations. To call arbitration a "judicial" proceeding, a statement itself dictated by interest, may serve dynamically to effect in the speaker as well as others that attitude toward it which the speaker, consciously or unconsciously, would initially have preferred.[105]

Because the term also has a scientific meaning, besides its emotive connotation, we are able to employ it emotively in a fashion swayed by our interests, and at the same time utilize its scientific aspect as well to apply alien legal criteria and associations. Quite obviously calling arbitration a "judicial" process is more persuasive and impressive than describing it as it really is and more conducive to our aspirations for absolute "justice." By this illusion of absolute norms we may obtain the satisfaction of feeling that there is an insurance for our attitudes superior to the self-doubts and imperfections of "man-made" decisions based on principles of what the arbitrators conceive to be fair in the particular matter. But such satisfaction is, at best, deceptive and a poor substitute for seeing things as they really are.

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105. Pareto, V., *The Mind And Society*, Vol. I, p. 311 (New York, 1935): "In contrast with what takes place in logico-experimental thinking, where the value of a term increases in proportion to its exactness the terms of reasoning by accord of sentiments are more effective in proportion as they are vague and indefinite. That explains the abundant use such reasonings make of terms such as "good," "beautiful," "just," and the like."

This is not to say that the abandonment of emotive terms is here indicated; their importance is bound to remain paramount and vital to our way of life. Indeed, it is due largely to emotive language, that anything at all approaching a satisfactory universe can exist for us. Much of what we call "culture" is a structure of emotive symbols by which life is lifted from the level of the prosaic into more aesthetic realms. The strictly scientific use of language is not too interesting and, ideally, possessed of little evocative power. For most of us, such a language cannot do justice to the genuine enthusiasm, sympathy, and warmth which we feel and must express.

But certainly in the realm of law, the use of such terms must be always under our control. We must be aware of what we are doing when we use such terminology and we must not be duped by the aura of sanctity about some of its key terms.

The method of the arbitrator in arriving at a decision is basically sound. After all is said and done he may be doing more openly what the courts have sometimes done less consciously—that is, actually deciding a particular matter, as an expert, on a broad basis of fairness. As Judge Jerome Frank once so candidly stated:[106]

> "The judge, at his best, is an arbitrator, a 'sound man' who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case. . . . The bench and the bar usually try to conceal the arbitral function of the judge. . . . But although fear of legal uncertainty leads to this concealment the arbitral function is the central fact in the administration of justice. The concealment has merely made the labor of the judges less effective."

When discussing the validity and desirability of applying arbitration to disputes between stockholders of "close" corporations, let us make sure that the actual decision is not rendered on the basis of the use of the word "corporation" as a sort of hook on which we are hanging preconceptions and associations stemming from our concepts regarding "public" corporations.

To realize that arbitration is not a "judicial" proceeding is not to demean it. After all, in law as in other fields, we must first become acquainted with the nature of a disorder before we can apply

106. Frank, Jerome, *Law And The Modern Mind*, p. 157 (New York 1936). He goes on to remark in a footnote on pp. 157-8: "Is not the present-day growth of nonjudicial arbitration largely due to an attempt to have that equity flourish which the courts have seemed to deny? *** The question is not whether we shall adopt 'free legal decision' but whether we shall admit that we already have it."

a satisfactory remedy. In the last analysis arbitration must depend for its value less upon emotive terms of approbation and more upon the capacity and insight of the arbitrator's mind, for its validity upon his business acumen and sagacity, and for its importance upon *his* importance, that is, upon his adequacy to speak for human beings and to adjust differences between them. If the utmost vigilance is exercised to see to it that the arbitration panels are constantly made up of such a calibre of men, arbitration will fulfill a vital need of our business society—and particularly so if, in conjunction therewith, any remnants of "word-magic" are abandoned by all the participants in the arbitration process.

INCENTIVE PROBLEMS IN ARBITRATION*

Owen Fairweather

In plants where employees work under incentives, the establishment of incentive standards is the activity around which much of day-to-day labor relations problems resolve. This is perfectly natural. The incentive standards determine the compensation which the employee receives and the effort he must put forth. Employees naturally desire to receive more pay for less work which is an understandable human motivation. The maintenance of a sound incentive system is often essential to the company's survival. In many industries the competitive advantage of one company over the others is only found in the effectiveness of its incentive program. If such a company's incentive program gets out of gear, costs will "go to pieces" and the company starts to sink competitively.

From the viewpoint of our national economy the maintenance of sound incentive systems is equally important. If the attack by labor unions develops pressures which, when brought to bear against incentive programs, causes them to break down, the productivity per hour of our industrial system will go down. Stated another way, this is the same thing as saying that the maintenance of good incentive systems is one of the essentials to the maintenance of a high national standard of living.

All thoughtful managements who operate plants with incentive systems know all this and attempt to adopt for themselves a plan to protect their system from the injury which could result if those who attack the system can turn their attacks into destructive restrictions. When a company is willing to submit incentive disputes to arbitration, it can counteract the sloganized attacks of "speed up" and "chiseling" by replying "Let's find out if what you say is true; we will submit the question in dispute to an impartial outsider."

However, to the suggestion that incentive disputes be arbitrated, many managements will reply: "The whole idea seems all right—

* Excerpts from an address before the Industrial Management Society, Chicago, Ill., March 11, 1954.

but few of the recognized arbitrators are industrial engineers and the union wouldn't agree to arbitrate such disputes before an industrial engineer from a management consulting firm. Since we couldn't find an industrial engineer who was mutually acceptable, we don't think we should submit our incentive disputes to arbitration." Such belief seems reasonable on the surface, but a fundamental and deep-seated problem is revealed by such a position. If a management believes that it cannot convince an impartial arbitrator of the fairness of an incentive standard because he is not an industrial engineer, it is admitting that it can't convince just ordinary fairminded people that its incentive systems are fair. If that is true, how can management convince its employees and the union leaders who are not trained industrial engineers that an incentive standard or its incentive system are fair?

Let us now consider the problems which arise when an incentive dispute goes to arbitration. Such a dispute will rarely involve machine cycle time, as that can generally be mathematically determined. Such disputes, therefore, will generally involve the time required to perform the manual elements of the task, because the time recorded to actually perform the manual elements must be leveled to the time that a "normal" man would require to perform such manual tasks working either at day work (low task) or incentive (high task) pace. The dispute will resolve around the accuracy of the leveling of the operator performance time.

When the typical observation or judgment leveling has been used to level operator performance, the arbitrator will be asked to look through the eyes of a time study observer at an employee the arbitrator never saw, to determine whether the work pace was correct. The arbitrator is being asked to make a difficult decision. If the union also has the right to have one of its observers observe the employee performing the job, the dispute will involve the variation between the judgments of the two observers. Under such circumstances the arbitrator's problem is made even more difficult. There are ways to demonstrate in arbitration the accuracy of judgment leveling. However, since we cannot consider all of the proof methods here, let us consider in some detail one new method. This is the use of predetermined time values to prove the accuracy of a leveling of operator performance. This method will assume more and more importance in arbitration.

There are two rather well-known predetermined time systems: Methods Time Measurement and Work Factor. The MTM program

has been surrounded with a considerable amount of academic research. For example, Cornell University has published validation studies and now the MTM headquarters are at the University of Michigan. Since MTM has this academic, as well as practical background, it should be very persuasive in arbitration. However, MTM is a "low task" system. That means that the resulting time to perform the manual elements of the task represents the time a normal employee would require to perform the task at day work effort. You must assume that an employee will increase his effort above 100% by 20% to 25% as a result of incentive stimulation. In arbitration, a low task standard is more difficult to use because it involves this assumption that an employee can perform the task in 25% less time than the standard time indicates.

Work Factor produces a high task standard to which you add your incentive factor. It is then easier to point to the 25% incentive earnings opportunity which is added to the normal time in the calculation and say, "Mr. Arbitrator, there it is. We added 25% to the time and, as you will notice, that fully satisfies the contractual standard of fairness which provides that a standard will be unfair only if it does not provide 18% for incentive effort." A Work Factor standard is a little easier to handle in arbitration for this reason and the MTM association should publish its data so that normal times can be calculated directly on a high task basis.

If the time required to perform the manual portions of a particular task is computed under a predetermined time system and the result is submitted to the arbitrator, he will then have before him objective information upon which he can rely to make his determination concerning the accuracy of the judgment levelings which are in dispute. Incidentally, in this connection, professors of industrial engineering at the various universities can be extremely helpful to managements and to arbitrators. In fact, they carry a great responsibility in this effort to protect good incentive systems by assisting as expert witnesses in arbitration cases to explain to arbitrators the developmental background and accuracy of these newer techniques in arbitration. Acting as expert witnesses such men can analyze the application of a predetermined times method to a given job, and thereby minimize the doubts which might otherwise exist concerning the system and the particular application.

An argument can arise concerning the application of a predetermined time value to a particular motion. Such an argument is generally a question of whether the task requires a piece to be moved

to an "exact location" or to an "approximate location." Let us assume that a dispute over which of these two types of moves are involved arises and that the arbitrator makes what the management believes to be a mistake in his determination after having examined the job and having the alternate predetermined time applications fully explained. Since the arbitrator will be working with various alternative applications concerning which reasonable men might differ, he could select the one the company thought was wrong, but such a determination will usually change the standard a very small amount. If only such a change could be hoped for the union would not be encouraged to submit many cases to arbitration.

However, if the company is always willing to prove the fairness of an incentive standard to an arbitrator, the attitudes of the employees toward the system will be better and it will become able to prove the fairness of its standards to its employees. Labor agreements generally say that the management shall not change an incentive standard unless there is a change in the method of performing the task. This provision is the result of a desire to assure employees that standards will not be changed merely because earnings rise due to high effort. It is hoped thereby to make high effort more typical if they are freed from the fear that the standard will be cut. Such a provision of the labor agreement should provide that when the methods are changed, the standard will then become inapplicable and a new standard shall be established for the new method.

Where you have a change in the feeds and/or speeds of a machine which affect the time cycle required in performing the task, the problem is not particularly difficult to handle. The employee can see the machine go faster and the effect of such changes can easily be calculated. However, the methods change problem becomes more difficult when the methods change is simply a change in the employee's motion pattern. Let us illustrate this latter problem by two actual examples:

An operator takes a small washer and positions it over a hole on a short length of angle iron; puts one side of the washer under a spot welding machine and trips the machine; he then takes the part out and turns it around and places the other side of the washer under the spot welder and trips the machine. As soon as the standard was released, the employee placed the washer under the spot welder and made two spot welds with a "spot move spot" motion, then removed the piece and put it in the box.

The operator changed from an inefficient motion pattern to an

efficient one—only manual motions were changed but the normal time that was required to perform the task was reduced. Therefore, the standard should be revised for the more efficient motion pattern or method. Some unions, some managements, and some arbitrators incorrectly believe that such a change should be considered an employee-invented method change which does not justify a change in the standard. Such a concept puts a premium of the presentation of false motions when the task is being analyzed so as to gain an "unfair" advantage. Furthermore, it ignores the basic fact that incentive compensation pays for effort and not for ingenuity or skill.

Another example of motion pattern change involved the polishing of a hardware part. The employee took the part, put it against the polishing wheel, gave it a pass, then another pass, then a third. He then reversed the part in his hands and gave it three similar passes on the other end. Then he polished the two tips and put the part in the tote box. As soon as that method was recorded and the standard released, the employee changed the method to a five-pass method. He no longer turned the piece around in his hands. Therefore, he was employing a different method which consisted of a different motion pattern.

A time study representative observed the employee using the five-pass method instead of the eight-pass method on which the standard was based. This latter method had been established as the prescribed method. An operational analysis card which set forth a diagram showing the prescribed eight-pass method had been filed in the department and it contained the following statement: "No deviation from the prescribed method unless a new time study is made." When the change in method was discovered, the parts produced with five passes were examined and found to be satisfactory from a quality standpoint. A new time study observation was made on the five-pass method; a new standard was established for that method, and a new prescribed method was set forth on a new operational analysis card which was filed in the department. A Work Factor motion analysis was made and it established that 58 separate motions were required when the eight-pass method was used, whereas only 37 motions were required with the five-pass method. Therefore, the effort which was involved when five passes, rather than eight passes was used.

A dispute arose and the matter went to arbitration. The Work Factor analysis was used in the arbitration to prove the reduction in effort involved in the change in motion pattern and to demonstrate that such changes are changes in method. If the arbitrator had not

accepted that basic proposition, he would have challenged the very basis of the Work Factor system. The Work Factor system had been established too long to be cast aside. The arbitrator accepted the basic proposition and stated that the company had the right to specify the method to be used and hence had the right to specify the motion pattern to be followed. Since there was a change from the eight-pass method to the five-pass method, the management had two alternatives—it could have insisted on the use of the eight-pass method or adopt the five-pass method as the prescribed method and establish a new standard for that method.

The use of the "operational analysis card" on which the method to be used in connection with the particular standard was carefully specified was a factor of significance in the arbitration case just described. This card was filed in the department and available for inspection by the employee. That card carried this important instruction: "No deviation from this method." If there was a deviation, instruction made it clear that the standard did not apply.

By clearly attaching "standards" to "methods," arguments are reduced. Methods information should not be hidden away in the time study department. The employee performing the task and the foreman should be able to look in a box of cards and find the prescribed method for each standard. If it is not done, the employee will say when a motion pattern method change is discovered: "This is the way I have always done this job. Nobody told me how to do it." You would then have a more difficult argument on your hands, if the standard is changed to reflect a difference in motion pattern than if you can reply, "Why didn't you look in the box? The instructions on how each job is to be performed are always there." The methods descriptions in that box become management instructions and are proper instructions under the general rights of management to "direct the working forces."

ARBITRATION AND MEDIATION AMONG EARLY QUAKERS

George S. Odiorne

Thomas Olive, a Quaker who lived in Burlington, New Jersey about 1680 was a model arbitrator whom many a distressed union or management counsel might long for today. We are told that:

> "He had a ready method of business, often doing it to good effect in the seat of judgment on the stumps in his meadows; he contrived to postpone sudden complaints until cool deliberation had shown them to be justly formed, and then seldom failed for accommodating matters, much without expense to the parties."[1]

Mr. Olive was not an exception among the Quakers; from earliest days of the Society of Friends, the practice of arbitration was widely used. It began in England, was transplanted to America, and within the Society was the principal means by which the Friends resolved disputes without recourse to the courts of law. The earliest authority cited for arbitration of disputes of a personal or business nature between Quakers was the Bible. George Fox, the father of the Society of Friends, cites Saint Paul: "Dare any of you who have a matter against another go to law before the unjust, and not before the saints? Do you not know that the saints shall judge the world?"[2] However remote this might seem in current practice, to the Friend this was a mandate to take his affairs for arbitration to a "weighty friend" who would resolve the issues in dispute, without recourse to the courts.

This reluctance to submit disputes to courts of law grew out of the social singularity which the Society felt and sought to inculcate in its brethren. In order for such isolation to be practical, at the same time to maintain order and discipline, some system of dispute-solution was needed. As early as 1680 in England William Tewksbury

1. Jones, Rufus, *Quakers in the American Colonies* p. 385.
2. Fox, George, *Letters, Dreams and Visions* (1685).

had urged that "disorderly walkers" were to be cautioned by the overseers and, if necessary to be reproved by the general meeting. The penalty decreed for unrepentant friends was that they would be disowned.[3] Even earlier, Edward Burrough wrote in 1659 to the London meeting encouraging them not to spend their time in "needless, unnecessary, and fruitless discourse." He urged them to "determine, not in the way of the world by hot contests, by seeking to outspeak or overreach one another in discourse—but in love, coolness, gentleness and dear unity."[4]

The need for order and systematic solution of disputes was implemented by the establishment of certain quasi-judicial powers in the elders of the Society and of each local meeting. Richard Farnsworth in 1666 said of the elders that "their judgement is to stand good and valid."[5] The framework of an arbitral system was further spelled out by George Fox in his letters and advices to the Birmingham Friends in 1681.

"12thly; . . . If there happen any difference between frends and frends of any mater If it cannot be ended before the generall meeting let half a dozen of frends from the generall meeting be, once in every quarter of the year and to be appointed in such places as may be convenient for most frends to meet in. . . ."[6]

The technique of arbitration committees had been used in the Six Weeks Meeting in London in 1679, which reported that "a permenent arbitration committee was set up to deal with disputes between Quakers." These appear to have grown out of certain papers of advices from George Fox to the London Meeting in 1676. Under these, policy differences between friends arising out of business competition were squarely faced and the causes analyzed. Apprentice regulation, contracts, sales pressures, and competition were covered. All disputes between Quakers were to be settled by agreement or arbitration, never by recourse to law courts.[7]

For the light it throws upon the basic nature of arbitration, the American Quaker organization provides an interesting study. It was not only a homogeneous group, but was deeply preoccupied with maintaining group harmony. The leadership of the society recog-

3. Lloyd, Arnold, *Quaker Social History 1669-1738* p. 2.
4. *Op. cit.* p. 4.
5. *Op. cit.* p. 6.
6. From *Epistles and Advices to Birmingham Friends* by George Fox as cited in Thomas Elwood's "*Collection of Many Select and Christian Epistles, Letters, and Testimonies written by George Fox,*" Birmingham, 1698.
7. Lloyd, *op. cit.* p. 74.

nized that if they were to keep their people isolated from the general life of the community they would have to duplicate many of the common institutions of the broader society in which they lived. Arbitration seemed to be a very suitable substitute for the courts of the common public. This involved the development of a code whereby the arbitrators might judge. The penalty already existed, in that failure to comply would mean expulsion from the society. To most Quakers this was a mortal threat, for not only religious and social, but economic considerations grew out of their membership.

The greatest socializing influence next to the meeting for worship was the meeting for business. As Jones describes it, "Each decision was reached by taking the sense or judgement of the whole meeting, and each such conclusion was supposed to be under divine guidance, and was arrived at only by the unity of the body."[8]

Fidelity to a word of promise was a sacred obligation and every Quaker was expected to make righteousness in trade a matter of honor. Minute books of monthly meetings in the 18th century American colonies contain records similar in spirit to the following:[9]

> "There was a complaint brought up that a friend refuses to fulfill a promise he made two years ago respecting performing his proportion of work on the high-ways, therefore in consequences of said complaint we do appoint John Gifford, Benjamin Tripp, and Peleg Huddlestone to inspect into said complaint and if they find the friend refused to fulfil said promise agreeable to said complaint, to labor with said friend to fulfil it, so that truth and the professors thereof may not suffer on that account any longer."

In addition to contract violation, "weighty friends" dealt with problems of conflicting business interest and judgment.

> "There was brought a complaint to this meeting against a friend for refusing to come to a settlement in a division of a fence in the line between him and another friend, therefore we do appoint Nicholas Haviland and James Soule to labor with said friend to do what they shall think reasonable in the case after they have informed themselves the circumstances thereof."

In other instances the meeting served as a form of impartial chairman over sales practices of the friends.

> "The overseers informed that there is a bad report concerning two members salting up beef, and exposing it for sale, which

8. Jones, *op. cit.* p. 141.
9. Jones, *op. cit.* p. 149.

was not merchantable; and they have made some inquiry and do not find things clear, therefore this meeting appoints a committee to make inquiry."

Here it is seen that the Quakers practiced a rudimentary form of mediation and fact-finding, as well as arbitration. A study of these minutes further reveals that almost every conceivable form of dispute was settled by individuals or committees appointed by the meetings. A worker who was in the employ of a Quaker had the recourse of presenting his grievance to the local meeting if a breach of word were involved.

When New Jersey became the property of the Duke of York in 1664, the land between the Hudson and Delaware Rivers was granted to John Lord Berkeley and Sir George Carteret. This formed the basis of a historic arbitration proceeding. Carteret renamed the territory New Jersey and divided it east and west with Lord Berkeley. By 1674 Berkeley had become an old man, and in dire straits financially. In March of that year he conveyed his half of the state to two Quakers for the sum of 1,000 pounds. John Fenwick was a litigious old Cromwellian soldier and a Buckinghamshire yeoman. chant.[10] Bowden reports that, as was customary with commercial disputes between Quakers, the quarrel over this half of the State of New Jersey was submitted to Quaker William Penn for arbitration. One-tenth was awarded to Fenwick and nine-tenths to Byllinge. Complications in business shortly thereafter soon forced Byllinge to assign his nine-tenths in trust for his creditors to a committee of Quakers, including William Penn, Gawen Lawrie, and Nicholas Lucas. Subsequently Fenwick's tenth came under their control as well.[11]

As a result of this arbitration and reports of John Fox, Penn's attention to the new world was stirred. His trusteeship for Byllinge shortly afterward required closer attention to the situation. It is sometimes designated as a cause of his asking Charles II for the grant of Pennsylvania in liquidation of the debt of the crown to Penn's father.[12]

The condition of the legal system prior to 1700 in New Jersey was such that the arbitration system of the Quakers was a major influence in commercial development of the region. Lee reports: "There were no regularly admitted lawyers at the New Jersey Bar

10. *Ibid.* p. 362.
11. Bowden, *History of Friends In America.*
12. Jones, *op. cit.* p. 364.

before 1702, and the rules of the Supreme Court show that from 1704 to 1766 only two of the eight chief justices were licensed attorneys."[13]

While English standards governed the practice of law and the operations of the courts, the major legal system was the extra-official system of the Quakers. Its impact on justice in the colony and the state to follow have been described as follows:

> "Less concerned with the technicalities of the courts than with the administration of substantial justice, the old Quaker idea of righteousness in dealing with rights of property owners may well have laid the foundations of a system that today makes 'Jersey Justice' proverbial."[14]

In addition to commercial transactions, Quaker arbitration and mediation occasionally extended to marital disagreements as in the case when a quarreling pair were called before Quaker justices in Burlington and asked if they wouldn't attempt to live peacefully together. Mary agreed and so did Thomas, he stipulating that Mary "will acknowledge that shee hath scandalized him wrongfully." To this Mary consented, but added a last word, "but saith that shee will not own that shee hath told lies of him to her knowledge." This challenge to harmony is reported to have delayed further presentments: "But after some good admonition they both p'mise that they will forgett and never mention what unkind speeches or actions have formerly past between them concerninge each other."

As a major concentration of Quakers grew up around Philadelphia, arbitration grew accordingly. The Minutes of the Philadelphia Meeting in 1685 decreed that Friends should not go to law until an attempt had been made by the meeting to settle the dispute.[14] The speedy nature of arbitration and conciliation as compared with law courts made it suitable to the Quaker purpose of maintaining harmony through prompt airing and settlement of disputes. In the Queries of the Philadelphia meeting of 1743 it was asked: "and where differences happen, are endeavors used to have them speedily ended?"

The general procedure here was for the matter to be aired at the local meeting, and if the members present were unable to determine the facts, a committee of arbitration was then appointed to "labor with" the disputants and reach a decision.

Further south, the minutes of the White Oak Swamp meeting in

13. Lee, F. B., *New Jersey As A Colony and State.*
14. Jones, *op. cit.* p. 439.

Virginia show a similar plan.[15] Differences, disputes and controversies were not taken to court but were settled in meeting by the family method. Two Friends in Virginia in 1749 had a financial difference which the monthly meeting considered would, if continued, have "pernishous consequences to the trooth and its prosperity." The meeting took up the case and induced the contenders to submit their case to the judgment of three Friends. It was thus settled satisfactorily, "brotherhood between them was preserved and scandal was prevented." There are hundreds of similar arbitrations on the minute books of the Virginia meetings during the eighteenth century, and generally if not always, the affairs were settled and brotherhood preserved.[16]

An interesting and significant outgrowth of the Quaker system was the "sense of the Meeting." This compromised a major difference between Quaker arbitration and modern arbitration. There was a great informality in Quaker procedures, the key to the meeting method being in silence while waiting for the divine principle to begin working in responsive hearts. This aura worked to produce unanimity of opinion as to equity and justice. Hence, voting and parliamentary law were out of place. Any member could speak when he was moved during the meeting. The key figure in the proceeding was the clerk, a man of spiritual discernment as well as clerical skill who listened and observed, or spoke if he was moved. It was he who framed the decision and announced it, holding it open at that point until the others had decided upon its fairness and validity. Once convinced that the sense of the meeting was achieved the clerk then made his pronouncement as a decision and this became the award, "and the whole power of the Society was behind its acceptance."

15. *op. cit.* p. 316.
16. Minutes of the White Oak Swamp Meeting, 1749.

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

ARBITRATION AGREEMENT ON REVERSE SIDE OF SALESNOTE IS BINDING WHERE NOTATION, IN BOLD TYPE ON FACE OF SALESNOTE, CALLS ATTENTION TO ARBITRATION CLAUSE. A party seeking a stay of arbitration under a Standard Cotton Textile Salesnote alleged that the printed matter on the reverse side of the confirmation form had not been called to his attention. The court held that the notation in bold type on the face of the confirmation form and across its entire width that "This order is subject to the provisions . . . on the reverse side" sufficiently called to the attention of the buyer the arbitration provision which was set forth on the reverse side. *Central States Paper & Bag Co., Inc. v. Chicopee Mills, Inc.,* NYLJ, June 25, 1954, p. 5, reargument denied, July 16, 1954, p. 3, Geller, J.

CANCELLATION OF A CONTRACT FOR ALLEGED NON-PERFORMANCE DOES NOT REMOVE OBLIGATION TO ARBITRATE. This decision, digested in Arb. J. 1954, p. 51, was unanimously affirmed. *Jac-Lar Products Co., Inc. v. S. & S. Corrugated Paper Machinery Co., Inc.,* 283 App. Div. 1071, 131 N.Y.S. 2d 899 (2d Dept. June 7, 1954).

RETENTION BY BUYER OF SALES CONTRACT FORM CONTAINING ARBITRATION CLAUSE DOES NOT CONSTITUTE AGREEMENT TO ARBITRATE when form required buyer to sign and return contract and seller who made shipment of goods further failed to insist upon return of contract or to inquire about failure of buyer to do so. Said the court: "There would be no warrant for a finding in these circumstances that the parties had entered into a contract to arbitrate and petitioner has failed to sustain the burden of establishing the existence of a substantial issue as to the making of such a contract." *Pavia & Co. v. Fulton County Silk Mills,* 284 App. Div. 391, 131 N.Y.S. 2d 358, (1st Dept. June 15, 1954). Judge Breitel dissented, pointing out that the majority holding "does not accord with commercial practice or commercial needs."

ACCEPTANCE OF DELIVERY OF GOODS ORDERED ORALLY AND RETENTION OF INVOICE WHICH REFERRED TO TWO PREVIOUS WRITTEN CONTRACTS did not constitute an agreement to arbitrate even though two previous contracts contained arbitration clauses. These contracts for sale of nylon tricot contained also a provision to the effect that "no modification . . . shall be binding unless in writing signed by both parties." Additional yardage was thereafter ordered orally and delivered. The invoices, which the buyer retained, referred to the two previous contracts. This did not constitute an agreement to arbitrate with respect to the additional yardage. Arbitrators exceeded their authority in making an award on the additional yardage. The matter was remanded to the same arbitrators "for further proceedings in which any award should be confined to the balance due on the goods sold and delivered under the written contracts." *James Talcott & Co., Inc. v. Wertheimer,* 284 App. Div. 248, 131 N.Y.S. 2d 370 (1st Dept. June 8, 1954, Callahan, J.).

AGREEMENT BETWEEN TWO ASSOCIATIONS FOR ARBITRATION OF DISPUTES BETWEEN MEMBERS NOT BINDING UPON NEW MEMBER OF ASSOCIATION where there was "nothing to indicate that respondent ever gave up its rights to resort to the courts in favor of any other forum." Although members are generally bound by an association's agreement that its members will arbitrate (*Mencher v. B. S. Abeles & Kahn,* 274 App. Div. 585), here, the joining party agreed to be bound by by-laws, regulations and a contract between the association and the union. Nowhere, in any of the documents the new member agreed to observe, was there any mention of the contract between the two associations. In denying a motion to compel arbitration, the court said: "Nor does it appear that respondent in joining the association ever assented to anything done by the association except what it specifically agreed to." *Kurzman v. Ted Herman, Inc.,* NYLJ, May 27, 1954, p. 7, Steuer, J.

ARBITRATION STAYED WHEN SETTLEMENT AGREEMENT SUPERSEDES TERMS OF ORIGINAL CONTRACT with arbitration clause and where "no evidence of substance" is shown necessitating a preliminary trial to determine the meaning of the papers which constituted the basis of the accord and satisfaction. *Elgin Fabrics Corp. v. A. Goodman and Co., Inc.,* NYLJ, Sept. 1, 1954, p. 5, Brisach, J.

II. THE ARBITRABLE ISSUE

ARBITRATION STAYED PENDING DETERMINATION BY NLRB WHETHER A GROUP OF NON-UNION EMPLOYEES ARE WITHIN UNIT OF PRODUCTION AND MAINTENANCE EMPLOYEES. This is a reversal of a decision digested in Arb. J. 1954, p. 52, in which a lower court denied employer's motion for stay of arbitration. *Amperex Electronic Corp. v. Rugen,* 284 App. Div. 808, 132 N.Y.S. 2d 93. (2d Dept. July 7, 1954).

DISCHARGE OF EMPLOYEE FOLLOWING TENTATIVE DENIAL OF SECURITY CLEARANCE SUBJECT TO ARBITRATION UNDER CLAUSE COVERING "ALL DISPUTES, DIFFERENCES AND GRIEVANCES WHICH MAY ARISE OUT OF THIS AGREEMENT." The decision, digested in Arb. J. 1954, p. 52, was unanimously affirmed with the statement: "It is noted that the denial of clearance was tentative and not final. It may be that questions of law and public policy will survive the arbitration, and as to which the arbitrator's award may not be conclusive." *Fitzgerald v. Sperry Gyroscope Co.*, NYLJ, June 16, 1954, p. 6, (App. Div. 1st Dept.).

AMOUNT OF WORK CONTRACTED OUT IS AN ARBITRABLE ISSUE. A dispute on the amount of work to be given to contractors was held arbitrable under a collective bargaining agreement between members of an association and a union providing for arbitration of "any acts, conduct or relations between the parties or their respective members, directly or indirectly." Inasmuch as the distribution of work was mentioned in several clauses of the collective bargaining agreement, the court stayed court action until arbitration be had, saying: "It is true that the gravamen of plaintiff's action are alleged representations made by the defendants, but those representations concern themselves with the amount of work which plaintiff would receive, and inasmuch as this action is for damages based upon an affirmance of the agreement it must be subject to arbitration." *Schulz v. Gilrich Modes, Inc.*, NYLJ, June 18, 1954, p. 9, Rabin, J.

CLAIM FOR DAMAGES DUE TO DELAY IN COMPLETING WORK WITHIN STIPULATED TIME is arbitrable under a clause providing for arbitration of disputes "concerning a matter of execution, interpretation or purpose of this contract." *1988 Second Avenue Corp. v. Neiblum Const. Co., Inc.*, NYLJ, Sept. 1, p. 5, Brisach, J.

EXPULSION OF PHYSICIAN FROM PARTNERSHIP IN GROUP MEDICINE PLAN WAS NOT AN ARBITRABLE ISSUE despite partnership agreement providing for arbitration of controversies with respect to rights of partners, where plaintiff failed to "set forth any facts indicating that the grounds for his expulsion were not substantiated, and in the light of the record which shows that the procedure for expulsion provided by the articles of copartnership was pursued." Since the burden of proof was on the physician, rather than on the partnership, the Court of Appeals reversed order of a lower court which had directed arbitration. *Essenson v. Upper Queens Medical Group*, 307 N.Y. 68, 120 N.E. 2d 209. (May 20, 1954).

CLAIM FOR ADDITIONAL COMPENSATION AS WAGES IN PENNSYLVANIA IS ARBITRABLE under common law despite specific exclusion from 1927 Pennsylvania Arbitration Act of "all contracts for personal services." An employee instituted suit for difference in pay between rate for molder-coremaker and leading molder-coremaker, claiming that the arbitration provision of the collective bargaining contract to which he was subject was inapplicable because the Pennsylvania Arbitration Act specifically excluded

from its operation all contracts for personal services. The court stayed the action and rejected plaintiff's contention, saying: "It must be conceded that the Arbitration Act is inapplicable but the parties to the present contract . . . are not restricted to the procedure or limitations of that Act. Public policy in Pennsylvania has long favored arbitration of disputes even to the extent of outlawing statutes which attempted to abolish it. Plaintiff's claim for additional wages is based on rates of pay fixed by the collective bargaining agreement. He cannot be allowed benefits under the favorable provisions of the agreement and refuse to be bound by the terms which are to his disadvantage. . . . Clearly, the answer to plaintiff's contention is that the 1927 Act did not abrogate common law arbitration; the remedy provided by that Act is cumulative merely and not exclusive." *Povey v. Midvale Co.*, 105 Atl. 2d 172 (Superior Ct. of Pa., May 27, 1954, Hirt, J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

ALL PARTNERS NEED NOT JOIN IN DEMAND FOR ARBITRATION OF DISPUTE BETWEEN ARCHITECTS' PARTNERSHIP AND ANOTHER PARTY. However, arbitration was stayed because partner demanding arbitration failed to specify in his demand any question relating to any dispute between the partnership and the other party. *Baker v. Board of Education*, 131 N.Y.S. 2d 658 (Sup. Ct. Steuben County, June 13, 1954).

COMMENCEMENT OF A LAWSUIT DOES NOT NECESSARILY WAIVE OR ABANDON RIGHT TO ARBITRATION. In a dispute between a distributor of periodicals and a publisher, the former sued the latter over non-payment of accounts. The petitioner alleged he did not know whether refusal of the respondent was based upon a dispute as to the correctness of the books (an arbitrable issue) or on some other grounds. The court held that under the circumstances, the petitioner "was not abandoning its right to arbitrate in the event a controversy arose." *Am. News Co., Inc. v. Avon Publishing Co., Inc.*, 130, N.Y.S. 2d, 554.

WHETHER AN AGREEMENT TO CHARTER A VESSEL WAS CANCELLED IS AN ISSUE TO BE DECIDED BY THE ARBITRATORS, AND NOT BY THE COURT. The accord and satisfaction terminating an agreement between an owner of a vessel and the charterer became the subject of a dispute. Arbitration was directed by the court, which stated that "issues of law and fact are for determination by the arbitrators," in accordance with the recent case of *Reconstruction Finance Corp. v. Harrisons & Crosfield*, 204 F. 2d 366, cert. den. 346 U.S. 854. *Petition of Ropner Shipping Co., Limited*, 118 F. Supp. 919, 1954 American Maritime Cases 446 (S.D. N.Y., Weinfeld, J.).

COURT ACTION BY UNION MEMBER FOR DAMAGES IN ALLEGED WRONGFUL DISCHARGE STAYED in absence of employer's waiver of arbitration. Decision of lower court, digested in Arb. J. 1953, p. 201, was affirmed. Employer is entitled to stay action pending arbitration even though the union member was unable to obtain arbitration because of expiration of time limit for seeking arbitration. *Ott v. Metropolitan Jockey Club*, 307 N.Y. 696, 120 N.E. 2d 862 (June 4, 1954).

LABOR ARBITRATION STAYED UNDER FEDERAL ARBITRATION ACT. Sec. 3 of the Federal Arbitration Act applies to collective bargaining agreements covering employees who are engaged in the production of goods for subsequent sale in interstate commerce. Such employees are not a "class of workers engaged in foreign or interstate commerce" within the meaning of the exclusionary clause of Sec. 1 of the Federal Arbitration Act. *Harris Hub Bed and Spring Co. v. United Electrical, Radio & Machine Workers of America, U.E.*, 121 F. Supp. 40 (U.S. Dist. Ct., Middle District of Pa., May 11, 1954, Watson, C. J.).

COURT WILL NOT DIRECT ARBITRATION WHERE PRESIDENT OR TREASURER OF UNION DEMANDING ARBITRATION FAILS TO INSTITUTE PROCEEDINGS as required by Section 12, General Association Law. Order of lower court to direct arbitration reversed for lack of jurisdiction. *International Union, United Automobile Aircraft and Agricultural Implement Workers, CIO, Local* 1171 *v. Aircooled Motors, Inc.*, 284 App. Div. 835 (4th Dept. July 9, 1954).

COURT ACTION AGAINST A UNION FOR BREACH OF CONTRACT TO RECOVER DAMAGES DUE TO STRIKE CANNOT BE STAYED PENDING ARBITRATION by invoking the Federal Arbitration Act. Employees "engaged in interstate commerce" fall within exclusionary clause of Section 1 of the Act. *Miller Metal Products, Inc. v. United Electrical, Radio & Machine Workers of America*, 121 F. Supp. 731 (D. C. Maryland, April 27, 1954, Coleman, CJ.).

COURT DIRECTS ARBITRATION OF STOCK OWNERSHIP DISPUTE DESPITE TRANSFER OF STOCK TO AN ASSIGNOR. Corporate stock held by an assignor was subject to an agreement containing an arbitration clause. "This being so," the court said, "the right to compel arbitration survived the assignment for the benefit of creditors." *Karabell v. Clyde Associates, Inc.*, NYLJ, July 9, 1954, p. 2, Rabin, J.

FAILURE TO PROCEED TO ARBITRATION WITHIN TIME LIMIT CANNOT BAR ARBITRATION WHERE COMPLIANCE WITH TIME LIMIT "WOULD OBVIOUSLY BE IMPOSSIBLE IN MOST CIRCUMSTANCES." A union's demand for arbitration of the bona fides of an alleged liquidation of the employer's business was challenged by the employer on the ground that the union had failed to comply with the contract provision that "the dispute shall be submitted to an arbitrator within 24 hours after written notice has been given by either side to the other of inability to adjust." The court said that "literal compliance with the provision . . . would obviously be impossible in most circumstances since no arbitrator was named in the agreement and attempts to select an arbitrator and submit the dispute to him within 24 hours would be most unlikely to succeed except on rare occasions." Motion for a stay of arbitration denied. *Teschner v. Livingston*, NYLJ, Aug. 4, 1954, p. 2, Gold, J.

IV. THE ARBITRATOR

ARBITRATION CANNOT BE STAYED FOR ALLEGED MISCONDUCT OF ARBITRATOR WHILE ARBITRATION PROCEEDINGS ARE IN PROGRESS. Motion to stay arbitration denied "without prejudice to any application petitioner desires to make after arbitration is closed and decision is rendered by arbitrators." *Dutch-American Raw Materials Corp. v. Valhalla Mills, Inc.*, NYLJ, Aug. 25, 1954, p. 2, Di Falco, J.

COURT WILL NOT DIRECT ARBITRATOR ON PROCEDURE inasmuch as arbitrator has authority to decide "how to proceed with the arbitration or how to rule with respect to issues before him. All such issues, whether of fact or of law, are for the arbitrator exclusively (*Matter of Lipman*, 263 App. Div. 880)." *Nadalen Full Fashion Knitting Mills, Inc. v. Barbizon Knitwear Corp.*, NYLJ, June 16, 1954, p. 10, Arkwright, J.

ARBITRATOR MAY AWARD INTEREST ON CLAIM (See Matter of Burke, 191 N.Y. 437, where the Court of Appeals said in 1908: "The demand for interest, ordinarily, inheres in a claim for moneys due upon a contract and withheld by the debtor, as a compensation for the detention.") AAA fees and administrative expenses as allocated in the award were also confirmed by the court "in accordance with Sec. 47 of Rule 9 of the Commercial Arbitration Rules of the American Arbitration Association." *C. F. Simonin's Sons, Inc. v. Antonio Corrao Corp.*, NYLJ, August 25, 1954, p. 3, Brown, J.

AWARD WILL NOT BE VACATED ON OBJECTION TO QUALIFICATION where as the court said, "respondent had sufficient information relating to the objection prior to the commencement of the arbitration to contest the qualification of the arbitrator designated on its behalf. The award of the three arbitrators is unanimous. Respondent resisted the claim of disqualification originally advanced by petitioner and gambled with the result. It cannot now be heard to complain." *Tanbro Fabrics Corp. v. Mardi Fabrics Co.*, NYLJ, June 24, 1954, p. 4, Greenberg, J.

COURT WILL NOT ALTER AGREEMENT OF PARTIES TO ARBITRATE BEFORE THREE ARBITRATORS. Such agreement cannot be changed by a court which is empowered only to designate an arbitrator for either or both of the parties to the dispute in the event that either or both shall fail to choose an arbitrator. *Cohen v. Standard Furniture Company*, 306 N. Y. 839, 118 N.E. 2d 904 (Court of Appeals, March, 1, 1954).

COURT WILL NOT APPOINT THIRD ARBITRATOR OF TRI-PARTITE PANEL without a showing that the two arbitrators have clearly failed or refused to do so in accordance with the procedure stated in the contract. The court said: "Until that is shown, the court should not exercise the power (*Bluhm v. Perenia*, 75 N.Y.S. 2d 170; *Matter of Dayton Allen*, 273 App. Div. 726)." *Matthews Installations, Inc. v. Peter Reiss Const. Co., Inc.*, N.Y.L.J., April 6, 1954, p. 7, Di Falco, J.

POWER OF THE COURT TO ORDER ARBITRATION IS LIMITED BY THE AGREEMENT OF THE PARTIES. When an agreement terminating book distribution provides that the accountants reconcile the accounts, and no more than that, arbitration is thereby limited to that specific matter. A court order to compel arbitration is similarly to be limited to the reconciliation of the accounts between the parties (*Hub Industries, Inc. v. George Manufacturing Corp.*, 269 App. Div. 177, aff'd 294 N.Y. 897). *Am. News Co., Inc. v. Avon Publishing Co., Inc.*, 130, N.Y.S. 2d, 554.

V. ARBITRATION PROCEEDINGS

SUBPOENA DUCES TECUM SHOULD BE ISSUED BY ARBITRATOR RATHER THAN JUDGE, where arbitrator is authorized to do so under Sec. 1456, C.P.A. Said the court: "It would appear that the better practice would be to have the subpoena issue under the hand of the arbitrators. The arbitrators will know what they want produced and in that way questions of what is material will be avoided." *U. S. Rubber Co. v. Polly Prentiss, Inc.* NYLJ, June 2, 1954, p. 6, Steuer, J.

AWARD CONFIRMED DESPITE FACT THAT HEARINGS WERE HELD IN ABSENCE OF ONE OF THREE ARBITRATORS CALLED FOR BY CONTRACT. A party who participated in hearings before only two arbitrators without objecting on this ground, waived his right to object at later time (sec. 1458 C.P.A.), despite fact that presence of all arbitrators is required by statute (sec. 1456). *D'Agostino v. Reisman*, NYLJ, July 12, 1954, p. 3, Olliffe, J.

SEPARATE DEMANDS FOR ARBITRATION BASED ON CONTRACTS SEPARATELY MADE BY VARIOUS PARTIES CANNOT BE CONSOLIDATED. Said the court: "To arbitrate in a joint and single proceeding with petitioners who have separate and independent agreements with it [the respondent] would amount to an alteration of the special contract for arbitration. Respondent did not agree to arbitrate in that manner and such procedure may not be imposed in the absence of agreement therefor." *Franc, Strohmenger & Cowan Co., Inc. v. Designs by Stanley, Inc.*, N.Y.L.J., April 28, 1954, p. 8, Di Falco, J. Unanimously aff'd NYLJ June 22, 1954, p. 5 (1st Dept.).

AWARD CONFIRMED DESPITE REFUSAL OF ARBITRATORS TO HEAR COUNTERCLAIM BASED UPON A CONTRACT WHICH WAS NOT MADE PART OF THE ARBITRATION. A textile company sold fabric to a customer under three separate contracts, each of which contained an arbitration clause. Arbitration was demanded only under the second of these contracts. The refusal of the arbitrators to hear a counterclaim based on the first contract did not constitute misconduct. Said the court: "Since it was the second contract that was submitted to arbitration, the arbitrators acted properly and without prejudice. Respondent has further remedy if it feels aggrieved with respect to the first contract." *Concord Textile Co., Inc. v. Fall River Mfg. Co., Inc.*, NYLJ, July 1, 1954, p. 3, Greenberg, J.

FAILURE OF UMPIRE AND INSURANCE COMPANY-APPOINTED APPRAISER TO HEAR EVIDENCE ON "ACTUAL CASH VALUE" OF FIRE-DESTROYED PROPERTY CONSTITUTES MISCONDUCT. Plaintiff's premises, insured by defendant insurance company against loss by fire for a sum not exceeding $6,000, were partially destroyed by fire. Each of the parties designated one appraiser pursuant to the policy, and a court appointed a third person as an umpire. An award was signed by the umpire and the appraiser appointed by the insurance company, but not by the plaintiff-appointed appraiser. The award merely set forth the determination of the actual cash value of the premises as $15,000 and the amount of loss as $4,960, without any further itemization. The award held the insurance company liable only for $2,480. The Appellate Division set the award aside for refusal of the umpire and the company-appointed appraiser to hear and receive proper evidence bearing on the "actual cash value" of the premises. The Court of Appeals ruled that since the award had been set aside as the result of an action brought by the insured, who had not been at fault, he need not submit to any further appraisement but may sue on the policy, under the authority of *Aetna Ins. Co. v. Hefferlin*, 260 F. 695. *Gervant v. New England Fire Ins. Co.*, 306 N.Y. 393, 118 N.E. 2d 574 (Ct. of Appeals of New York, March 11, 1954, Conway, J.).

AWARD REMANDED TO ARBITRATORS FOR THE SOLE PURPOSE OF INDICATING THE PARTY OR PARTIES AGAINST WHOM A COUNTERCLAIM WAS ALLOWED where the arbitrators' intention was not so clearly indicated as to justify the assumption that omission of individual names was a mere oversight. *My-Mill Co. v. Halpert*, 283 App. Div. 1055, 131 N.Y.S. 2d 884 (1st Dept. June 21, 1954).

REFUSAL TO RECEIVE FURTHER EVIDENCE IS NO GROUND FOR VACATING AN AWARD, when the employee, in requesting the postponement, did not specifically state that he wanted to submit further evidence. Moreover, the added proof of overtime work could not affect the result since he was found by the arbitrator to be an executive foreman and under the collective bargaining agreement only a working foreman was entitled to compensation for overtime work. *Moskowitz v. Phillips*, N.Y.L.J., January 28, 1954, p. 7, Hofstadter, J.

COURT REMITS MATTER TO ARBITRATORS FOR DETERMINATION AS TO PRESENT CONDITION OF UNDELIVERED GOODS, where award required buyer to accept goods with the understanding that such acceptance shall not constitute a waiver of buyer's right to receive merchandise of a quality and kind described in the contract. Said the court: "Unfortunately, this extra precaution destroys the finality of the arbitrators' determination. It leaves the way open for another dispute on the same subject matter. There is no necessity for vacating the arbitration. The matter should be remitted to the arbitrators to make a determination as to the present condition of the undelivered goods either through inspection or testimony and to make an award based on that." *Arthur Siegman, Inc. v. Schreiber Importing Co., Inc.*, NYLJ, May 28, 1954, p. 6, Steuer, J.

VI. THE AWARD

COURT APPROVES MODIFICATION OF AWARD BY DELETION OF OBJECTIONABLE PORTION UNDER SEC. 1462a C.P.A., RATHER THAN VACATING WHOLE AWARD. A lower court order, digested in Arb. J. 1954, p. 51, vacated a minimum pay award for week-day work as going beyond the scope of a submission which confined arbitration to payment for ordered shape-ups on Saturdays. The Appellate Division expressed doubt that the arbitrator exceeded his authority but added: "Inasmuch as the appellants have stipulated in open court, however, to delete from the arbitrator's award the portion which the union found objectionable in its motion to vacate the award, we need not pass upon the propriety of the provision. Certainly this provision may be deleted under section 1462-a of the Civil Practice Act without otherwise affecting the merits of the award." *O'Rourke v. Brighton Materials Co., Inc.,* 283 App. Div. 1014, 131 N.Y.S. 2d 240 (1st Dept. June 4, 1954).

FINE IMPOSED FOR CONTEMPT OF COURT FOR FAILURE TO COMPLY WITH COURT ORDER ENTERED UPON AN AWARD, despite a subsequent action for declaratory judgment seeking to have declared illegal the contract upon which the arbitration award was based. *Burstin v. Levine,* NYLJ, June 25, 1954, p. 5, Geller, J.

COURT ORDERS PAYMENT OF SUM TO SATISFY ARBITRAL AWARD. A decision of Arbitration Commission of Daytona Beach, (Florida) Board of Realtors on the division of a real estate commission was not complied with by the (participating) party dissatisfied with the decision. Action at law, namely on the agreement to pay commission and on the award, led to a final judgment for payment of the sum awarded. Said the Supreme Court of Florida: "Appellant has been twice convicted of failing to pay a just obligation, first by his brother real estate brokers, and, second, by a jury of his neighbors. We find that both proceedings were regular in all respects and free of error." *Greene v. Ward,* 66 S. 2d 64 (Supreme Court of Florida, July 16, 1954, Drew J.).

COURT WILL NOT DISTURB ARBITRATORS' INTERPRETATION OF SUBMISSION "EVEN IF NOT IN STRICT CONFORMITY WITH LEGAL PRINCIPLES AND RULES OF LAW AS APPLIED IN THE COURTS." An award of the New Hampshire Board of Conciliation and Arbitration granting vacation pay was challenged on the ground that the evidence did not support the findings. The court ruled that "the strong doctrine in favor of the finality of awards . . . would bar the introduction of parol evidence tending to explain the award." *Franklin Needle Co. v. American Federation of Hosiery Workers, AFL, Local* 173-A, 105 Atl. 2d 382 (Sup. Ct. N. H., May 27, 1954, Lampron, J.).

ARBITRATORS' ERRORS OF LAW CORRECTED BY COURT where arbitration clause provided for conclusions of law by arbitrators to be subject to modification or correction by courts, pursuant to express provision of Pennsylvania Arbitration Statute of 1927. *Pennsylvania Electric Co. v. Shannon,* 105 Atl. 2d 55 (Supr. Ct. of Pa. June 5, 1954).

AN EDITORIAL

(*Continued from Page* 113)

University of Minnesota, to prepare a revised draft of a uniform arbitration act. The document which resulted follows closely along the lines of the model statute prepared by the Law Committee of the American Arbitration Association and published in *The Arbitration Journal* in 1952. As Dean Pirsig points out in his article in this issue, the draft provides for legal enforcement of arbitration agreements, thus offering the relief so urgently sought by trade associations, labor unions, management groups and businessmen generally.

The importance of the decision of the Commissioners to adopt the draft is not limited to the field of domestic transactions alone. It encourages elimination of obstacles to arbitration of foreign trade disputes as well. Indeed, the draft resembles a document recently prepared by the American Juridical Committee of the Pan American Union on International Commercial Arbitration, to be published in a forthcoming issue of *The Arbitration Journal.* The legal premises of the draft approved by the Commissioners are also consistent with the Draft Convention on Enforcement of International Arbitral Awards which the United Nations Economic and Social Council is considering.

Dean Pirsig makes it clear, in his article, that the action of the Commissioners on Uniform State Laws does not become official until approved at three successive annual meetings. Nevertheless, there is reason to be hopeful that the progress noted this year, resting as it does on a firm base of successful experience, will be rendered permanent, to the great advantage of all Americans.

FORM OF BEQUEST

I give, devise and bequeath to the American Arbitration Association, Inc. in New York .....

.....

.....

(Insert the amount of money bequeathed, or a description either of specific personal or real property, or both, given, or if it be the residue of an estate, state the fact.)

NOTE: *All contributions to AAA by gift or membership enrollment are tax exempt.*